Supreme Court, U.S.
FILED

98 1266 FEB 4 1999

OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

DEBBIE L. BENNINGFIELD, PEGGY FRANKHOUSER and PAMELA M. GRANT,
Petitioners,

v.

SAM NUCHIA, CHIEF, C.O. BRADFORD, J.R. JONES, A. WADE RUNNELS, ROBERT T. FLEMING, RICHARD J. PFEIL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOAN M. LUCCI BAIN
Counsel of Record
BAIN & BAIN, P.L.L.C.
1535 WEST LOOP SOUTH
4TH FLOOR
HOUSTON, TEXAS 77027
(713) 629-6222
(713) 629-6226 FAX

Attorneys for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

3715 99

QUESTIONS PRESENTED FOR REVIEW

1. Is a pervasive pattern of retaliatory harassment against a public employee who has reported matters of significant public concern actionable under 42 U.S.C. § 1983 as a violation of the First Amendment, or must the retaliatory conduct amount to a tangible employment decision? In this interlocutory appeal, reviewing denial of summary judgment on qualified immunity grounds, the Fifth Circuit held that retaliatory conduct more severe than that found actionable in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed 2d 52 (1990) (*i.e.*, failure to recall, transfer, and refusal to promote), was not sufficiently adverse or punitive to form the basis of a First Amendment case.

   The Fifth Circuit requires an "adverse employment action," which it defines as "discharge, refusal to hire, refusal to promote, demotion, or formal reprimand," for retaliatory conduct to be actionable. This rule is contrary to the holdings of the majority of the other Federal Courts of Appeals.

2. When retaliation takes the form of a campaign of harassment, should the court dissect the retaliatory conduct into separate occurrences and consider whether each isolated act is actionable (as done by the Fifth Circuit in this case) or must the court look to the chilling effect of the conduct as a whole, taking into account the totality of the surrounding circumstances, expectations and relationships? *See Oncale v. Sundowner Offshore, Inc.*, 118 S. Ct. 998 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) and *Rutan v.*

Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed 2d 52 (1990). Is the inquiry different at the summary judgment stage when the issue is qualified immunity, as is this case?

3. Is a 42 U.S.C. § 1985 conspiracy claim maintainable against a municipality through the conspiratorial acts of its agents? Does this Court recognize the "Intracorporate Conspiracy Doctrine"? The Federal Courts of Appeals are split on this issue.

PARTIES TO THE PROCEEDING

Petitioners

Debbie L. Benningfield, Peggy Frankhouser and Pamela M. Grant.

Respondents

Sam Nuchia, former Chief of the Houston Police Department; C. O. Bradford, current Chief of the Houston Police Department and former Assistant Chief over the Identification Division; J. R. Jones, former Assistant Chief over the Identification Division; A. Wade Runnels, Administrator of the Identification Division; Robert T. Fleming, former Assistant Administrator of the Identification Division (retired); Richard J. Pfeil, Identification Division Supervisor.

Other Interested Parties

The City of Houston and The Firemen's and Policemen's Civil Service Commission of the City of Houston.

TABLE OF CONTENTS

Questions Presented for Review i

Parties to the Proceeding iii

Table of Contents iv

Table of Authorities viii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 3

A. Background 6

B. Protected Speech 7

C. The Injurious Conduct 9

Argument for Granting the Writ 15

I. The Fifth Circuit's Ruling Conflicts with *Rutan v. Republican Party of Illinois*, and Other Decisions of this Court Concerning the Minimum Standard for Actionable Conduct in an Employment Setting 15

II. The Fifth Circuit's Restrictive Interpretation of Actionable Conduct under the First Amendment Conflicts with *Pickering* Because it Enables the Government to Accomplish Indirectly What it Is Prohibited from Accomplishing Directly: Denial of the Benefits of Government Employment Through the Creation of a Hostile Working Environment. 19

III. The Federal Courts Are in Need of Guidance from this Court to Establish a Minimum Standard for Actionable Conduct under the First Amendment. This Court Should Grant Certiorari to Resolve Conflicts among the Courts of Appeals and to Ensure Uniformity of Decisions. 23

IV. This Court Should Grant Certiorari to Answer a Question of First Impression in this Court, and Resolve Conflicts among the Courts of Appeals Concerning Whether Agents of a Corporation, May Serve as Conspirators Brought under Section 1985 27

Conclusion 30

Appendix

Appendix A
5th Circuit Opinion (filed 10/5/98) 1a

Appendix B
Hearing Minutes and Order
(filed 4/16/97) 20a

Appendix C
4/11/97 Hearing Transcript 22a

Appendix D
Memorandum and Recommendations
(filed 3/4/97) 81a

Appendix E
Order denying rehearing 121a

Appendix F
Letter granting extension to file
petition for rehearing 123a

Appendix G
Petitioners' Petition for Rehearing
(filed 10/23/98) 124a

Appendix H
Summary Judgment Timeline ordered
by the District Court 152a

Appendix I
Index to the four-bound volumes of
Summary Judgment Evidence 180a

Appendix J
Affidavit of Debbie L. Benningfield . . 186a

Appendix K
Affidavit of Pamela M. Grant 237a

Appendix L
Affidavit of Peggy Frankhouser 262a

Appendix M
Affidavit of Terry Wood. 270a

Appendix N
Affidavit of Joan Anderson, Ph.D. . . 275a

Appendix O
Affidavit of Norbert LeBlanc 286a

Appendix P
March 2, 1992 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser 290a

Appendix Q
Excerpt from 1991 Management Review Document 324a

Appendix R
TEX. LOCAL GOV'T CODE § 143.086. . . . . 331a

TABLE OF AUTHORITIES

Cases

Agosto-de-Feliciano v. Aponte-Roque, 889 F.2d 1209 (1st Cir. 1989) (en banc) 24

Arizona v. Evans, 514 U.S. 1 30

Behrens v. Pelletier, 516 U.S. 299, 116 S. Ct. 834 (1996) 5

Benningfield v. City of Houston, 157 F.3d 369 (5th Cir. 1998) 20

Bernheim v. Litt, 79 F.3d 318 (2nd Cir. 1996) 24

Blum v. Schlegel, 18 F.3d 1005 (2nd Cir. 1994) 25

Board of County Commissioner's, Waubasee County, Kansas v. Umbehr, 518 U.S. 668, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996). 20

Brever v. Rockwell Int'l Corp., 40 F.3d 1119, (10th Cir. 1994) 28, 29

Brown v. Disciplinary of the Edgerton Volunteer Fire Department, 97 F.3d 969 (7th Cir. 1996) 26

Burlington Industries v. Ellerth, 524 U.S. ___,
118 S. Ct. 2257 (1998). 15, 16

Colston v. Barnhart, 146 F.3d 282 (5th Cir. 1988). 5

Crawford-El v. Britton, ___ U.S. ___,
118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) . . . 26

Dahm v. Flynn, 60 F.3d 253 (7th Cir. 1994) 25

Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594
(5th Cir. 1981). 29

Garza v. City of Omaha, 814 F.2d 553 28

Givhan v. Western Line Consol. Dist.,
439 U.S. 410, 9 S. Ct. 693, 58 L. Ed.
2d 619 (1979). 27

Harrington v. Harris, 118 F.3d 359
(5th Cir. 1997), *cert. denied*, ___ U.S. ___,
118 S. Ct. 603 (1997) 21

Harris v. Forklift Systems, Inc., 510
U.S. 17, 114 S. Ct. 367,
126 L.Ed. 2d 295 (1993) 17

*Hartman v. the Board of Trustees of Community College,
District No. 508, Cook County,
Illinois*, 4 F.3d 465 . . . . . *28*

Hilliard v. Ferguson, 30 F.3d 649
(5th Cir. 1994). 27

Huang v. Bd. of Governors of University of North Carolina, 902 F.2d 1134 (4th Cir. 1990); 25

Hulbert v. Wilhelm, 120 F.3d 648 (7th Cir. 1997) 25

Hyland v. Wonder, 972 F.2d 1129 (9th Cir. 1992) 24

Irizarry v. Hon. Carlos Quiros, 722 F.2d 869 (1st Cir. 1983) 28

Jeffers v. Barnes, 20 F. Supp. 2d 404 (S.D.N.Y. 1988) 23

Johnson v. Hills & Dales Gen'l Hospital, 40 F.3d 837 (6th Cir. 1994) *cert. denied*, ___ U.S. ___, 115 S. Ct. 1691, 131 L. Ed. 2d 560 28

Johnson v. Jones, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). 3, 5, 21

Kiersey v. Diamond, 1990 U.S. App. LEXIS 8319 (10th Cir. Apr. 29, 1998) 26

Mattern v. Eastman Kodak Co., 104 F. 3d 702 (5th Cir. 1997) 20

Mitchell v. Forsyth, 472 U.S. 511, S. Ct. 2806, 86 L. Ed. 2d 411 (1985) 3

Morphin v. Albuquerque Public Schools, 906 F.2d 1434 (10th Cir. 1990). 26

Novotny v. Great Fed. Sav. & Loan Ass'n, 442 U.S. 366, 99 S. Ct. 2345 (1979) 15

Nunoz v. Vlaskamp, 147 F.3d 867 (9th Cir. 1998) 24

Oncale v. Sundowner Offshore, Inc., 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). 17

Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). 23

Pickering v. Bd. of Education of Township High School District 205, Will County, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) 20, 26

Pierce v. Texas Dept. of Criminal Justice, 37 F.3d at 1149 (5th Cir. 1994) *cert. denied*, 115 S. Ct. 1957 . . . . . 16, 17, 21

Pieczynsky v. Duffy, 875 F.2d 1331 (7th Cir. 1989) 25, 26

Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34 (1st Cir. 1993). 24

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990) . . . . . *passim*

Sharp v. City of Houston,___ F.3d ___,
1999 U.S. App. LEXIS 315
(5th Cir. Jan. 12, 1999). 16, 20, 21, 29

Wagner v. Wheeler, 13 F.3d. 86
(4th Cir. 1993) 25

Watkins v. Bowden, 105 F.3d 1344
(11th Cir. 1997). 26

Constitutional Provisions

U.S. Const. amend. I 1

U.S. Const. amend. XIV 2

Statutes and Rules

28 U.S.C. § 1254(1). 1

42 U.S.C. § 1983 . . . . . 2, 4, 30

42 U.S.C. § 1985 . . . . . 2, 27, 28, 30

TEXAS LOC. GOV'T CODE Sections 143.036
and 143.108 . . . . . 10, 12

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 157 F.3d 369 (5th Cir. 1998). (App. A, pp. 1a-19a). Petitioner's motion for rehearing was denied on November 6, 1998. (App. E, p. 121a). The United States District Court for the Southern District of Texas denied summary judgment on Respondents' claim of immunity on April 11, 1997, by pronouncement on the record (App. B., p. 20a & App. C, pp. 22a-80a), adopting in part and revising in part the recommendations of the U.S. Magistrate. (App. D, pp. 81a-120a). These decisions are unreported.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on October 5, 1998, as revised October 22, 1998. (App. A). The Court granted an extension of time for filing the Petition for Rehearing,(App. F, p. 123a). and denied the Petition for Rehearing on November 6, 1998. (App. E, p. 121a). This Petition for Writ of Certiorari is being filed within ninety days after the denial of the Petition for Rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioners respectfully suggest that review is appropriate pursuant to Rule 10 of the Rules of the Supreme Court of the United States, subsections (a) and (c)).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Religious and political freedom. Congress shall make no law . . . abridging the freedom of speech. . . . or the right of the people . . . to petition the Government for a redress of grievances.

U.S. Const. amend. XIV

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where in they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Sec. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

42 U.S.C. § 1983

Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. § 1985

Conspiracy to interfere with civil rights

. . .

(2) Obstructing justice; intimidating party, witness, or juror. . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing,

or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, . . . for the purpose of depriving , either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . .

in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or case to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

STATEMENT OF THE CASE

This is an interlocutory appeal from denial of qualified immunity on summary judgment under *Mitchell v. Forsyth*, 472 U.S. 511, 527, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); and *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). Jurisdiction in the District Court was based on federal question.

Petitioners are three certified Class B (special services) police officers assigned to the Identification Division ("ID")

of the City of Houston Police Department ("HPD").[1] Respondents are the former Chief of Police, two assistant chiefs (one is the current chief), and Petitioners' supervisors in ID.

Petitioners brought suit under 42 U.S.C. §§ 1983 and 1985 for violations of their First and Fourteenth Amendment rights based on Respondents' campaign of retaliatory harassment, which included tangible and non-tangible employment decisions. Petitioners each reported serious contamination of HPD's criminal history records,[2] and long-term and pervasive discrimination against women within ID.[3]

---

[1] Class B officers perform fingerprinting, criminal histories, crime scene investigation, crime lab analysis, and similar forensic services. All Class B officers are certified by the Texas Commission on Law Enforcement Standards and Education ("TCLEOSE") and have attended the police academy. (App. D, p. 83a).

[2] The District Court described the contents of plaintiffs' speech as follows:

> [I]n this case, the plaintiffs have clearly alleged that they spoke out regarding inappropriate uses of the IAD process and concerning what I'll summarize as corruption or impropriety in the police department and that they voiced their complaints through appropriate channels about deliberate falsification and tampering with criminal history and lack of training of new personnel which resulted in a contamination of criminal history. . . . (App. C, p 35a).

[3] The District Court granted summary judgment on plaintiffs' equal protection claims finding they were preempted by Title VII. (App. C, p. 29a). As this is an interlocutory appeal on

The United States Magistrate who first considered defendants' motions made factual findings that were accepted by the District Judge, except where modified in her April 11, 1997 pronouncement. (App. 20a). The Magistrate and District Judge both concluded that the evidence created fact issues as to Respondents' motivation for their actions against Petitioners (App. 54a-65a) and whether Respondents' conduct was deliberately indifferent. (App. 97a).[4] The Fifth Circuit denied Petitioners' motion to dismiss the appeal under *Johnson v. Jones* based on its interpretation of *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834 (1996), as modifying *Johnson*. *See Colston v. Barnhart*, 146 F.3d 282 (5th Cir. 1988).

The Fifth Circuit found Benningfield's and Frankhouser's demotions sufficiently adverse to state a claim against Runnels and Fleming , but disallowed all other acts of retaliation. Grant's First Amendment claim was dismissed entirely. (App. 7a-13a). The court also exercised jurisdiction and dismissed Petitioners' pendent state claims, applying the federal rather than state qualified immunity standard. Petitioners filed a motion for rehearing urging the court to consider the First Amendment claims based on the cumulative pattern of harassment in the context of the Petitioners'

---

qualified immunity grounds, that issue was not before the Fifth Circuit.

[4] The four volumes of evidentiary support for Petitioners' case is annotated to the appellate record at App. I (App. 181a-185a). At the hearing the District Court ordered Petitioners to prepare a chronology annotated to the summary judgment record (App. 20a, 24a-25a), which is reproduced at App. 153a-179a. References in the time line to evidence not contained in the appendix can be traced to the appellate record through App. I. See comment regarding record references. (App. 185a).

specialized jobs. (App. 124a). The petition was denied without explanation. (App. 121a).

A. Background.

Petitioners are fingerprint experts. Benningfield and Frankhouser have a nationally acknowledged expertise in the Automated Fingerprint Information System ("AFIS"), a computer system designed to store fingerprints and criminal histories so that the data can be integrated and shared among various law enforcement agencies nationwide. (App. 189a-90a, ¶¶ 10, 11, pp. 210a, ¶ 10).

In 1985, each petitioner reported contaminated criminal histories and a hostile work environment which resulted in the forced resignation of ID's former administrator. His son, Respondent Runnels, replaced him as administrator in 1986. Respondent Runnels used his position to get even with those he held accountable for his father's demise, including Petitioners. (App. 84a, 187a-88a). The Assistant Administrator of the division, Respondent Fleming, shared Runnels' belief that women should not be allowed to hold positions of authority and lent his support to the campaign. (Doc. 43, p. 117). Some examples of the retaliatory conduct include filing an IAD complaint against Benningfield which falsely accused her of stealing criminal histories, issuing Grant a written reprimand for making a "bum identification" from a fingerprint card which she proved had been altered; defying seniority rights by assigning females to night shift; refusing to give promotional exams in violation of the civil service laws in order to prevent Petitioners from

promoting (App. 84a-85a); and assigning Frankhouser onerous workloads (App. 152a, 155a).[5]

B. Protected Speech.

In February 1991, Officers Benningfield and Frankhouser witnessed Grant's emotional breakdown, which was later ruled to be the result of job-related stress. Petitioners each gave statements detailing the contaminated criminal histories and the hostile atmosphere in the division to the attorney investigating the incident. In June 1991, Benningfield and Frankhouser gave statements in connection with a second female officer's stress-related injury-on-duty claim, that of Officer Marilyn Mokwa. (App. 190a, ¶¶ 12-13; App. 264a, ¶ 5).

As part of the investigation of Grant's injury, then Chief Watson ordered a management review of ID. (App. 189a, 241a). Petitioners each gave statements to management review offering evidence of the contaminated criminal histories, and the causes.[6] Respondents Runnels and Fleming

---

[5] In 1985, Frankhouser was promoted to Latent Print Examiner. Respondents needed her special expertise, but rather than allowing her to continue in special assignment as other officers with a special expertise (App. 86a), they required her to continue in her assigned special project – the AFIS installation contract, and required her to carry a full assignment as a latent crime scene investigator. This double load created extreme physical and emotional stress. No other ID employee was required to carry such a load.

[6] Causes include mishandling of criminal histories, failure to maintain the confidentiality of criminal histories, misidentification of prints resulting in crimes being charged to the wrong perpetrator, failure to enter latent prints, intentionally

immediately wrote letters to the investigators accusing Frankhouser and Benningfield of misconduct, "having their own personal agenda," "bypassing the chain of command," and "being troublemakers in the department." (App. 158a). Nonetheless, the management review admitted the seriousness of the criminal history problem:

> Finding #12: Confidence in the Department's Criminal History Database has suffered due to HPD management's position which can only be characterized as "uninterested." Several personnel interviewed, in addition to documents obtained from Mrs. Wood's [Grant's] husband (Terry) and AFIS [Benningfield] and Latent Print Examiner staff [Frankhouser], call into question the accuracy of the Department's criminal information database. . . .
>
> Neither Division's management has demonstrated an appreciation of the seriousness that a corrupted criminal history database could pose to the Department (and the City).

(App. 326-30a). (Emphasis added).

After the management review, respondent Bradford was appointed assistant chief over ID. He set about to discredit the findings of the management review by conducting his own "informal investigation" (App. 65a), which was far less reliable. (Doc. 13, p. 834). Afraid that the results would be "buried," Petitioners Benningfield and Frankhouser

---

tampering with prints, and improper use of and training for AFIS, which resulted in incorrect information being entered into the database. (App. 189a, 241, 292a-23a).

authored and delivered a letter to then Police Chief Elizabeth Watson. (App. 292a-323a).[7] The letter outlined the serious mismanagement that was contaminating HPD's criminal histories and seriously impacting morale. The letter advised that the conduct of the administrators (Respondents Runnels and Fleming) had taken a serious toll on the health of numerous Identification Division employees, including Petitioner Grant and Officer Mokwa. (App. 291a). Contrary to HPD policy, Respondent Nuchia gave Respondents Runnels and Fleming a copy of the letter. (App. 267a). Benningfield later filed an IAD complaint using the letter to the chief as the charge. (App. 200a, ¶ 40).

In early 1992, Respondent Jones, who had replaced Respondent Bradford as Assistant Chief over ID, conducted another investigation of Grant's injured-on-duty status. During the investigation Grant gave verbal and written statements to Jones and Nuchia about the conditions in ID which had caused her injury, including the contaminated criminal histories. (App. 156a, 241a-42a).

In August 1992, Benningfield suffered an emotional collapse and failed to report to work for two days. She and Frankhouser testified at two civil service hearings arising from that incident. (App. 219a, 229a).

C. The Injurious Conduct.

1. Petitioner Benningfield. Benningfield was ordered to report outside the chain of command directly to Runnels. Runnels ordered her to "document" every error made by ID employees on the AFIS system, which fostered

---

[7] Shortly thereafter, Benningfield and Frankhouser presented the same document to Watson's successor, Respondent Nuchia.

hostility against her because he led them to believe that she was documenting their files without authorization. (App. 194a). Benningfield was also prevented from attending State AFIS interface project ("State interface") meetings, at which her presence was needed and specifically requested by the State and HPD's representative.[8] She was ordered to train new employees on AFIS on the night shift (11:00 p.m.–7:00 a.m.); denied leave to attend educational conferences; and ordered not to talk directly the representatives of Printrak, the contractor which designed and maintained the AFIS system. (App. 189a-91a).

Benningfield was constantly threatened with being removed as AFIS manager, purportedly because the management review recommended that the position be given to the next higher rank. She was qualified to promote and vacancies required that a promotional exam be given. Benningfield requested that the exam be given, but Respondents delayed the exam for over 18 months in violation of TEXAS LOC. GOV'T CODE Sections 143.036 and 143.108. (App. 331a). She, like Frankhouser, then promoted to Latents, but continued to be held accountable for AFIS failures that should have been the responsibility of the new AFIS Manager. (App. 197a, ¶33).

This ongoing campaign to punish Benningfield eventually led to her own emotional collapse in August 1992, during which she failed to report to work for two days. Respondents had discretion to treat Benningfield's absence as sick or compensatory time (App. 234a), but Benningfield was charged with AWOL and disciplined for it. (App. 195a-97a,

---

[8] State interface is a statewide project commissioned by the Texas legislature to "interface" the criminal history data bases of law enforcement agencies statewide.

198a, ¶ 35). Benningfield asked Respondent Nuchia to allow Internal Affairs to investigate the AWOL charge, but he refused, instead allowing the supervisors who caused her emotional collapse to punish her. (App. 196a, ¶ 27; 220a, ¶ 39). The Civil Service Commission found the multiple disciplinary actions against her, which included lowering her job performance review ("JPR"), docking her pay, a written reprimand, and demotion from her position as AFIS manager, to be the result of a "investigation that was anything but complete and objective," and could be viewed as malicious "retaliation." (App. 206a, 224a). Although the hearing officer ordered the reprimand removed, Respondents have never removed it from her file. (App. 175a).

Respondent Nuchia thwarted IAD's investigation of Benningfield's complaint by ordering IAD not to investigate the criminal history and retaliation allegations. He also overruled IAD's recommendation that Benningfield be removed from the division for her own protection during the investigation, and ordered Benningfield to be evaluated for mental fitness by the APC, against IAD'S recommendation. (App. 167a-74a).[9] Administrative Personnel Committee ("APC") is a disciplinary committee that oversees disciplinary problems such as drug abuse, alcoholism, and similar long-term problems. (App. 242a, ¶ 11).

When promotional exams were finally given, Benningfield placed first on both. Nuchia referred her to the

---

[9] Anne Hebert, the IAD officer assigned to investigate Benningfield's compiaint, testified that Nuchia's interference with this investigation was unheard of and corroborates Benningfield's description of events. (Doc. 13, pp. 5-214). She was removed from IAD after testifying at Benningfield's two civil service hearings. (App. 17a, 233a). The District Court referred to this as "manipulation of the IAD process." (App. 54a-55a).

APC for alleged mental incompetence the day she passed the first exam.[10] (App. 200a-01a; 203a, ¶ 49-209a). After placing first on the second exam, Benningfield was threatened with promotional pass over and discharge. (App. 208a, ¶ 65), Although she passed the mental fitness exam, she was denied the AFIS assignment. (App. 207a-08a). Respondents' claim Benningfield was referred to the APC because of the AWOL incident, but she was not ordered to report to APC until she placed first on a promotional exam more than ten months after the AWOL. The District Court found a fact issue as to Respondents' motivation for the referral to APC and threats of pass over and discharge. (App. 64a-65a). The Court of Appeals disallowed the claim by resolving the fact issue in favor of Respondents. (App. 9a). Benningfield alleged continuing retaliation during the pendency of this case. (App. 210a).

2. Petitioner Frankhouser. Frankhouser contends she was punished by being assigned an unbearable workload. She was also denied overtime pay, accused of taking unauthorized vacation performing her AFIS duties, and subjected to written and verbal ostracism and humiliation. She was denied requests to attend training courses, and her co-workers were told they could not attend because of her. She was ordered not to communicate with Printrak, the company whose contract she was responsible for implementing. She was also prevented from attending AFIS interface conferences despite the request of HPD's interface representative. (App. 155a; 159a; 161a; 189a, ¶ 10; 194a, ¶ 23; 198a, ¶ 33; 264a-65a, ¶ 11; 267a, ¶ 17-268a, ¶¶ 8, 11, 20).

---

[10] Because she placed first, state law required that she be promoted. TEX. LOCAL GOV'T CODE § 143.036(f).

After Frankhouser's statements to management review, Fleming wrote scathing letters to the investigators appointed by Chief Watson, claiming Benningfield and Frankhouser had sabotaged the AFIS system. (App. 158a). These were not mere "criticisms," but allegations of misconduct made to the Chief's representatives to discredit her. Fleming's accusations constituted misconduct under HPD's general orders, yet, Fleming admitted in his deposition he has no evidence or recollection of the basis for them. (Doc. 13, pp. 382-85). They adversely affected Frankhouser's professional reputation and were intended to chill her speech.

Immediately after testifying at Benningfield's civil service hearing, Frankhouser's academy training position was removed and her job performance rating was lowered, allegedly for the use of profanity against a superior (one of the alleged grounds for Benningfield's discipline). (App. 171a; 268a, ¶ 20). Frankhouser resigned to accept a less prestigious, lower paying position with Montgomery County. (App. 84a). Frankhouser alleged constructive discharge, which the Fifth Circuit disallowed because Benningfield did not resign. (App. 13a).

3. Petitioner Grant. Five days after her March 14, 1991 statement to HPD investigators, Officer Grant was referred to the APC. (App. 156a, 241a-42a).[11] By August, Officer Grant was released to return to duty, if assigned to someone else's supervision. (App. 242a). There were several positions available for which she was qualified, but Respondents Bradford and Nuchia vetoed the recommendation of the City's Risk Management team that she be reassigned, and forced Grant to remain on "injured-on-duty" status. (App.

---

[11] Grant was already in the care of a psychologist and had been evaluated by several.

241-43a, 254a; 271a). Instead, Nuchia ordered Grant relieved of duty in the middle of the night for unspecified misconduct, after she had been on leave for over a year and contrary to Jones' recommendation.[12] (App. 244a-46a). Grant was so distraught that she attempted suicide. (App. 245a). Eventually, Grant lost her certification as a peace officer. Respondent Nuchia misrepresented to that agency that she was mentally unfit for duty, although the mental evaluation reported that she was competent to perform the duties of a peace officer in any police department other than HPD. (App. 247a). The District Court specifically found a fact issue existed as to Respondents' motivation for these decisions, especially Nuchia's false report to TCLEOSE. (App. 117-18a).

Petitioner Grant also presented evidence of a pattern of retaliatory harassment. She was falsely accused of making a bum identification after filing a grievance over discriminatory seniority practices, but still received a written reprimand. (App. 84a, 238a-39a). Immediately after filing an EEOC charge, she was assigned to Fleming. (App. 239a). Respondents also prevented Grant from promoting by delaying the civil service exam for over two years. (App. 242a, 247a, ¶¶ 13, 29).[13]

Respondents caused Grant's injured-on-duty status to expire and withheld her pay for nearly a year, until she accepted an involuntary medical retirement. (App. 243a, 247a). When Grant was relieved of duty, she was unable to

---

[12] "Relieved-of-Duty" is a disciplinary status distinct from "injured-on-duty" and usually results from severe misconduct. (App. 245a).

[13] Grant never received back pay for defendants' failure to promote her between 1989 and 1991.

surrender her badge because it had been taken from her by Respondent Runnels. Respondent Nuchia ordered an Internal Affairs investigation which corroborated the fact that Grant had been ordered by Runnels to surrender her badge. As part of the IAD investigation, Grant gave statements about the problems in ID. The IAD complaint against her was sustained even though the evidence conclusively established Runnels took it. (App. 246a).

ARGUMENT FOR GRANTING THE WRIT

Because this is a qualified immunity appeal, this case presents the Court with the opportunity to define the standard that determines at what point an injury is severe enough to entitle a First Amendment plaintiff to proceed to trial. The Fifth Circuit's holding here necessarily precludes any claim short of a tangible employment decision akin to that defined by this Court in *Burlington Industries v. Ellerth*, 524 U.S. ___, 118 S. Ct. 2257 (1998). Such a holding conflicts with this Court's precedent and the holdings of nearly all other circuits. Squarely presented is another question which this Court left open in *Novotny v. Great Fed. Sav. & Loan Ass'n*, 442 U.S. 366, 99 S. Ct. 2345 (1979), over which the circuits are split, whether – an intracorporate conspiracy involving multiple acts and multiple parties – such that the conspiracy can be found to represent a "custom policy or practice" of the municipality, is actionable under Section 1985. Thus, this case would enable the Court to resolve conflicts among the courts of appeals on two fundamental issues central to the constitutional right free speech.

ARGUMENT I

The Fifth Circuit's Ruling Conflicts with *Rutan V. Republican Party of Illinois*, and Other Decisions of this Court Concerning

the Minimum Standard for Actionable Conduct in an Employment Setting.

The Fifth Circuit has openly rejected the "dicta" in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990), that "trivial acts of retaliation may be actionable." *Pierce v. Texas Dept. of Criminal Justice*, 37 F.3d at 1149-50, n. 1, discussing *Rutan* 497 U.S. at 76, n. 8; *Sharp v. City of Houston*, 1999 U.S. App. LEXIS 315 at 25.

By holding that retaliatory conduct must be an "adverse employment action," which the Fifth Circuit restricts to tangible employment action akin to the definition of that term in *Burlington Industries v. Ellerth*, 524 U.S. ___, 118 S. Ct. 2257 (1998), the Fifth Circuit has departed from the rationale of *Rutan*, and the counsel of this Court as to the proper method of evaluating any claim of hostile working conditions. *Rutan* specifically rejected the argument that retaliatory conduct that is not punitive, is not actionable:

> Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. n6. This is not credible . . . . Employees denied transfers to workplaces reasonably close to their homes . . . will feel a daily pressure from their long commutes . . . . And employees who have been laid off may well feel compelled to engage in whatever . . . activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

Rutan, 110 S. Ct. 2736. *Rutan* was a patronage case, but the Fifth Circuit has applied its holding to "public concern" cases. *Pierce*, 37 F.3d at 1149. Thus, the Fifth Circuit's ruling here represents it interpretation of *Rutan*.

While a trivial act may not establish constitutional harm, the acts of retaliation against Petitioners, when viewed in their entirety, exceed any definition of triviality. The previous decisions of this Court in other contexts counsel that the punitive or "tangible" effect of harassment can be properly assessed only by considering the totality of the circumstances:

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)], *supra*, at 23. In . . . (all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. . . . The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

Oncale v. Sundowner Offshore, Inc., 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998). Public employees who have already survived the hurdles of establishing that their speech involved a matter of public concern, and that the law prohibiting retaliation was clearly established, and have presented sufficient evidence to create a fact issue as to motivation,

deserve no less objective view of the severity of the punishment they endured.

Petitioners hold occupations for which the government is [the only] source of employment." *Id.* at 2739. Petitioners have a special expertise in a science necessary to police work – finger printing, and in a system used solely by law enforcement – AFIS. Respondents' conduct which caused the revocation of Grant's license deprived her not only of her job, but also of her liberty interest in her career. Their exclusion of Benningfield and Frankhouser from State interface and refusal to address the contaminated histories, prevented them from carrying out their duty to interface HPD's AFIS system, and was detrimental to their careers. The chilling effect of Respondents' conduct towards Petitioners should have been considered in the context of a reasonable police officer subject to a strict code of discipline, with a limited and defined career path. Thus, the accusations of bypassing the chain of command amount to charges of insubordination. Referral to the APC for alleged mental incompetence is significant because it is something a law enforcement officer must disclose on any job application and is likely to prevent even limited career opportunities in the future. (App. 203a). The written reprimands given Benningfield and Grant, and the sustained IAD complaint against Grant, are permanent marks on their records.

Rutan suggests that in this qualified immunity appeal, the only issue before the Fifth Circuit was "whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their First Amendment rights." *Rutan*, 497 U.S. at 79. There can be no doubt that reasonable officers in Petitioners' shoes would have felt pressured to be silent. If that is the point at which the qualified immunity issue ends, the Fifth Circuit's opinion here

invites courts to go far beyond that inquiry, even to resolve fact questions about motivation.

Petitioners each suffered reprisals more severe than those judged actionable in *Rutan*, where this Court ruled that a transfer, failure to promote, or failure to recall after layoff, even without pay loss, is sufficient to state a First Amendment claim. Respondents' refusal to allow Grant to return to duty is no different than *Rutan*'s failure to recall after layoff. Respondents' conduct which caused the revocation of her license is far worse. The "delay" of Benningfield's and Grant's promotions is comparable to the failure to promote in *Rutan*, and is arguably more egregious since in this case state law required Respondents to conduct the exam and fill the vacancies within a specified time. (App. 331a). The daily reminder to Frankhouser, who was forced to work numerous hours of overtime to carry out her double assignment, and to expend her personal funds for necessary travel, is no less real and is significantly more tangible than the burden of the daily commute in *Rutan*.

These are not "trivial" matters. Petitioners suffered serious punishment. *Rutan* held any significant and improper punishment of an employee for having exercised First Amendment rights is unlawful. 110 S. Ct. at 2736. The Fifth Circuit's Opinion here is in conflict with this Court's mandate.

ARGUMENT II

The Fifth Circuit's Restrictive Interpretation of Actionable Conduct under the First Amendment Conflicts with *Pickering* Because it Enables the Government to Accomplish Indirectly What it Is Prohibited from Accomplishing Directly: Denial of the

Benefits of Government Employment Through the Creation of a Hostile Working Environment.

The Fifth Circuit reviewed each act in isolation, without considering the cumulative chilling effect of the retaliatory atmosphere from the perspective of a reasonable person in the Petitioners' shoes. Finding that the injuries were not adverse, the Court deemed it unnecessary to balance the interests of HPD against Petitioners' interest in free speech, as required by *Pickering v. Bd. of Education of Township High School District 205, Will County*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) and *Board of County Commissioner's, Waubasee County, Kansas v. Umbehr*, 518 U.S. 668, 135 L. Ed. 2d 843, 116 S. Ct. 2342 (1996). If this is the type of retaliation a public employee must endure without recourse for reporting corruption, and matters of public concern as critical as contaminated criminal histories, then the First Amendment rights of all public employees will be functionally eradicated.

The heightened standard the Fifth Circuit has adopted, defining "adverse employment action," to include only "hiring, discharging, promoting, compensating or granting leave, but not events such as "disciplinary filings, reprimands, or things that only might jeopardize employment in the future," (*Mattern v. Eastman Kodak Co.*, 104 F. 3d 702, 707-08 (5th Cir. 1997)), leaves First Amendment rights vulnerable to severe punishment. It leaves public employees defenseless to an atmosphere so hostile that a reasonable person would feel compelled to resign, as Frankhouser did here, or suffer an emotional breakdown, as Benningfield and Grant did here. Although *Mattern* was a Title VII retaliation case, the Fifth Circuit has imported the standard to First Amendment cases. *Benningfield v. City of Houston*, 157 F.3d 369, 375 (5th Cir. 1998); *Sharp v. City of Houston*, 1999 U.S. App. LEXIS 315,

26 & n.21 (5th Cir. Jan. 12, 1999); *Harrington v. Harris*, 118 F.3d 359, 365 (5th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S. Ct. 603 (1997) (holding that "Many actions which merely have a chilling effect on protected speech are not actionable.")The procedural posture of this case, an interlocutory appeal determining matters of law only,[14] makes the decision below especially alarming because it establishes a bright line rule that any conduct short of "discharges, demotions, refusals to hire, refusals to promote, and reprimands"are insufficient as a matter of law to state a First Amendment claim. *Pierce v. Texas Dept. of Criminal Justice, Inst. Div.*, 37 F.3d 1146, 1149-50 (5th Cir. 1994) *cert. denied*, 115 S. Ct. 1957; *Cf. Sharp v. City of Houston*, 1999 U.S. App. LEXIS 315 at 26, n. 21 (5th Cir. Jan. 12, 1999) (commenting, "We have not held this list to be exclusive and do not do so now, nor do we now expand it").[15]

Viewing each act of retaliation in isolation ignores the chilling effect repeated acts of retaliation have. The rule allowing supervisors who retaliate to escape liability by only delaying promotion disregards the significant impact a delay in promotion can have in addition to loss of pay. The holding that a retaliatory act that is subsequently overturned is not actionable overlooks the numerous hours of work and

---

[14] *Johnson v. Jones*, 515 U.S. 304, 115 S. Ct. 2151,2159, 132 L. Ed.2d 238 (1995).

[15] Although *Sharp* affirms a jury verdict in favor of that HPD officer, the court went out of its way to emphasize that it was compelled to do so because it was restricted to a plain error standard of review, and that the outcome would have been different if the defendant had filed a motion for judgment as a matter of law, which would have allowed a de novo review. *Sharp*, 1999 U.S. App. LEXIS 315 at 24, 29-31 & n. 25.

tremendous emotional investment an employee must commit to obtain this result.

This case demonstrates the Fifth Circuit's unwillingness to depart from its list of actionable conduct even slightly. Here, the court denied Benningfield's and Grant's claims for failure to promote by categorizing them as "delay in promotion." (App. 12a).[16] They avoid Grant's claims of refusal to recall after injury, the equivalent of a refusal to rehire, and loss of career by impermissibly resolving fact issues as to what motivated Respondents. (App. 8a). They disallowed Benningfield's reprimand claim because the Civil Service Commission overturned it, even though the evidence establishes that Respondents defied the civil service order and the reprimand remains in her file. (App. 10a-11a, 140a). They disallowed Frankhouser's claim that she was punished by being assigned as an onerous workload. (App. A, p. 10a). Had the Respondents not made the mistake of constructively demoting Benningfield and Frankhouser, the Fifth Circuit would have dismissed this case, despite the egregious facts, which it should have resolved in Petitioners' favor. Thus, its holding approves unbridled retaliation as long as it is not a listed offense.

This Court has long held that the government may not indirectly deprive its employees of First Amendment rights:

> if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and

---

[16] The Fifth Circuit mistakenly found that Benningfield received back pay when she was eventually promoted. On rehearing, Petitioners pointed out that she did not, but the court let its opinion stand. (App. 122a, 142a).

> inhibited. This would allow the government to "produce a result which [it] could not command directly."

Rutan v. Republican Party of Illinois, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990), quoting from *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). Here, Respondents engaged in numerous violations of Texas Civil Service laws, HPD's General Orders, and IAD procedures. The decision below allows the government to deny Petitioners these benefits of civil service employment as long as they do not discharge, demote, refuse to hire, or permanently refuse to promote. Surely, this is not the limit of the First Amendment's protection.

ARGUMENT III

The Federal Courts Are in Need of Guidance from this Court to Establish a Minimum Standard for Actionable Conduct under the First Amendment. This Court Should Grant Certiorari to Resolve Conflicts among the Courts of Appeals and to Ensure Uniformity of Decisions.

This Court has not decided the minimum level of injury protected by the First Amendment. Since *Rutan*, the federal courts of appeals have struggled to define the minimum contours of actionable conduct in a First Amendment retaliation case. There is little doubt that had Petitioners' case been decided in a different circuit, the outcome would have been different. *See Jeffers v. Barnes*, 20 F. Supp. 2d 404 (S.D.N.Y. 1988) (applying Second Circuit law to reach opposite result on similar facts). The First, Second, Fourth, Seventh, Tenth and D.C. Circuits have either rejected the Fifth Circuit's adverse requirement or interpreted

it differently to cover conduct other than tangible employment decisions. The Ninth Circuit, like several others, uses the same terminology, but applies it differently, *Nunoz v. Vlaskamp*, 147 F.3d 867, 874 (9th Cir. 1998), emphasizing "the type of sanction . . . need not be particularly great in order to find that rights have been violated"(citing *Hyland v. Wonder*, 972 F.2d 1129, 135 (9th Cir. 1992).[17]

The landmark case in the First Circuit is *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1218 (1st Cir. 1989) (en banc).[18] Under *Agosto-de-Feliciano*, the plaintiffs must "produce evidence of a sufficiently severe decline in his work conditions for a fact finder to conclude, under a clear and convincing evidence standard, that the plaintiff's work situation is unreasonably inferior to the norm for the position." *Rodriguez-Pinto v. Tirado-Delgado*, 982 F.2d 34 (1st Cir. 1993). *Agosto-de-Feliciano* sets forth a number of factors to be considered and a number of hypothetical situations as examples for what does, and does not amount to actionable conduct. *Agosto-de-Feliciano*, 889 F.2d at 1219-20.

The Second Circuit evaluates the overall impact of a pattern of petty harassment directed towards an employee, especially in the context of a qualified immunity appeal. *Bernheim v. Litt*, 79 F.3d 318, 325 (2nd Cir. 1996) ("We agree with the concurring opinion that a number of Bernheim's claimed damages and acts of retaliation, treated separately would be trivial and do not rise to the level a

---

[17] The court also cites older cases within its circuit applying "loss of a valuable governmental benefit or privilege," with approval. *Id.*

[18] The First Circuit considers this standard arguably more stringent than *Rutan*'s. *Rodriguez-Pinto v. Tirado-Delgado*, 982 F.2d at 34 n.5.

constitutional violation. However, in our view it would be burdensome to have the District Court 'prune' a complaint at the pleading stage by making a determination with regard to each allegation within a cause of action that it is legally cognizable when viewed in its totality."), *but see Blum v. Schlegel*, 18 F.3d 1005, 1010 (2nd Cir. 1994) (applying a version of the adverse employment action requirement). *Bernheim* requires a court to evaluate allegations of harm to a plaintiff's "reputation, opportunities for advancement and earning potential, and also considers emotional damages actionable." *Bernheim*, 79 F.3d at 325-26.

The Fourth Circuit requires that the retaliatory action deprive the plaintiff of some valuable benefit. *Huang v. Bd. of Governors of University of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990); *Wagner v. Wheeler*, 13 F.3d. 86, 89 (4th Cir. 1993).

The Seventh Circuit recognizes that a campaign of petty harassment may rise to the level of a constitutional violation when the speech is of significant public interest and the defendants have offered no reasonable justification for prohibiting the speech. *Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1994) (holding that subjecting employees to harassment or terminating supervisory authority over other employees amounts to adverse employment actions.")[19] *See also Hulbert v. Wilhelm*, 120 F.3d 648, 654 (7th Cir. 1997) (rejecting the defendant's "divide and conquer" strategy to argue that none of the adverse job actions on which the plaintiff relied amounted to the deprivation of a constitutional right). *See also Pieczynsky v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989)

---

[19] Even though the Seventh Circuit and Fifth Circuit use the same terminology, the level of actionable conduct encompassed within that phraseology is significantly different between the circuits.

(holding test is whether harassment is "so trivial that a person of ordinary firmness would not be deterred from engaging in the protected activity"); accord *Brown v. Disciplinary of the Edgerton Volunteer Fire Department*, 97 F.3d 969 (7th Cir. 1996).

The Tenth Circuit expressly rejects the position that only adverse employment decisions such as termination, suspension, or transfer are illegal, holding instead that "action short of an actual or constructive employment decision can in certain circumstances violate the First Amendment." *Morphin v. Albuquerque Public Schools*, 906 F.2d 1434, 1437 n. 3 (10th Cir. 1990). Since *Morphin*, the Tenth Circuit has only addressed the issue one time in an unpublished opinion, where it reaffirmed its adherence to *Morphin*. *Kiersey v. Diamond*, 1990 U.S. App. LEXIS 8319 (10th Cir. Apr. 29, 1998) (explaining that *Morphin* follows the Seventh Circuit's standard in *Pieczynsky v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989), requiring harassment to be severe enough to deter a person of ordinary firmness).

The Eleventh Circuit simply requires the District Court to apply the balancing test announced in *Pickering v. Bd. of Education of Township High School District 205, Will County*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968), without addressing the level of conduct required to give rise to the claim. *See Watkins v. Bowden*, 105 F.3d 1344, 1352 (11th Cir. 1997). *Cf. Crawford-El v. Britton*, ___ U.S. ___, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998) (inviting the lower courts to postpone inquiry regarding a public official's retaliatory motive until discovery on "objective factual questions such as whether the plaintiff suffered any injury. . ."). Hence, there is substantial divergence among the courts of appeals, but the Fifth Circuit is the only circuit to adopt the restrictive interpretation applied in this case.

ARGUMENT IV

This Court Should Grant Certiorari to Answer a Question of First Impression in this Court, and Resolve Conflicts among the Courts of Appeals Concerning Whether Agents of a Corporation, May Serve as Conspirators Brought under Section 1985.

The lower courts focused on Petitioners' speech regarding the contamination of criminal histories, but recognized that Petitioners also spoke out regarding discrimination against females. (App. 6a, 14a, 84a-86a). Reports of pervasive discrimination on the basis of sex are matters of public concern. *Givhan v. Western Line Consol. Dist.*, 439 U.S. 410, 9 S. Ct. 693, 58 L. Ed. 2d 619 (1979).

The Fifth Circuit denied Petitioners' Section 1985 claim based upon the City's argument that "a corporate entity and its employees constitute a single legal entity which is incapable of conspiring with itself" (App. 14a) (quoting from *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994). Although it recognizes an exception to the so-called Intracorporate Conspiracy Doctrine, where corporate employees act for their own personal purposes (App. 15a), it found the exception did not apply here. The court found that Runnels' personal motive (retaliating against those who were instrumental in his father's forced resignation) precluded a finding of class-based animus, a prerequisite to suit under Section 1985(3). (App. 15a). Not only does this holding ignore the fact that a large part of the evidence Petitioners presented against Runnels had to do with discrimination on the basis of sex, it also amounts to a holding that a conspirator cannot have a personal motive in addition to his discriminatory animus, or a "mixed motive." The Court's holding also precludes a Section 1985 claim based on co-

conspirators' shared animus or retaliation to cover it up. The logical conclusion to the court's reasoning is that a plaintiff can never demonstrate an intracorporate conspiracy under Section 1985(3) since in order to do so, the plaintiff would have to demonstrate a personal motive, and that motive displaces any class-based animus, which is an element of the cause of action.

Courts of appeals in other circuits disagree. In general, those circuits who recognize that an intracorporate conspiracy may be actionable under Section 1985 deem class-based animus to be in furtherance of the corporate agent's own personal purposes. *See Garza v. City of Omaha*, 814 F.2d 553, 556; *Hartman v. the Board of Trustees of Community College, District No. 508, Cook County, Illinois*, 4 F.3d 465, 469-70 (holding that a pervasive intracorporate conspiracy involving numerous acts undertaken by several corporate agents is actionable). *See also Irizarry v. Hon. Carlos Quiros*, 722 F.2d 869, 872 n. 2 (1st Cir. 1983); *see also Johnson v. Hills & Dales Gen'l Hospital*, 40 F.3d 837, 840 (6th Cir. 1994) *cert. denied*, ___ U.S. ___, 115 S. Ct. 1691, 131 L. Ed. 2d 560; *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1126-27 (10th Cir. 1994).

In *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119 (10th Cir. 1994), the Tenth Circuit summarized the disagreement among circuits as to the right of an employee to bring a claim under Section 1985(2) for conspiracy between her employer and co-employees:[20]

> Five circuits have extended the intracorporate conspiracy doctrine to actions under Sections

---

[20] The Fifth Circuit does not discuss Petitioners' Section 1985(2) issues based on retaliation for testimony at the civil service hearings.

> 1983 and 1985, while four others have severely limited or questioned the applicability of the doctrine in the civil rights context. We agree with the latter group of courts that the doctrine designed to allow one corporation to take action that two could not agree to do, should not be construed to permit the same corporation and its employees to engage in civil rights violations. . . . "In these situations, the action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose."

Brever v. Rockwell Int'l Corp., 40 F.3d at 1126-27, quoting from *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 603 (5th Cir. 1981). *Brever* is also instructive as to the necessary level of conduct to create an inference of a meeting of the minds. *Brever v. Rockwell Int'l Corp.*, 40 F.3d at 1127-28. Brever alleged that employees were told that whistleblowers would be dealt with severely, that she was forbidden from going to the FBI, and that she was subjected to a period of harassment and intimidation. *Id.* At least one jury has found a similar code of silence at HPD. *Sharp v. City of Houston*, ___ F.3d ___, 1999 U.S. App. LEXIS 315 at 32.

The intracorporate conspiracy doctrine troubled the District Court deeply, as it has numerous federal courts. (App. 49a-50a). Many federal courts have struggled with the issue and have reached varied results. The Fifth Circuit here distinguished its own precedent as "dicta." (App. 15a, n. 3) Yet, that same case is the precedent which guided the Tenth Circuit's decision in *Brever*. This Court's guidance is urgently needed.

CONCLUSION

In this case, the highest levels of the police department participated in the cover up of corruption and serious retaliation against truth-telling police officers. These officers are/were responsible for the integrity of not only the department's criminal history records, but also for the transmission of accurate criminal records to other law enforcement agencies, including the FBI, the Texas Department of Public Safety, and other Texas police departments. Members of this Court have recognized the public importance of insuring that such information be accurate. *Arizona v. Evans*, 514 U.S. 1, 27-28 (Ginsberg, J. dissenting).

Only this Court can prevent future instances of such callous disregard for this fundamental right by granting certiorari, reversing the Fifth Circuit, and remanding the case for trial. Petitioners therefore, respectfully pray that a Writ of Certiorari issue, and that this Court summarily dispose of this case, or grant Writ pursuant to S. Ct. R. 16 by reversing the decision of United States Court of Appeals for the Fifth Circuit dismissing Petitioners' 42 U.S.C. §§ 1983 and 1985 claims, vacate the remainder of that decision, and remand this case to the District Court for full consideration on the merits.

/s/_____
Joan M. Lucci Bain,
Counsel of Record
Bain & Bain, P.L.L.C.
1535 West Loop South
4th Floor
Houston, Texas 77027
713/629-6222
713/629-6226 Fax
Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed October 5, 1998]

DEBBIE L. BENNINGFIELD, Plaintiff -Appellee,	)	
PEGGY FRANKHOUSER; PAMELA M. GRANT Intervenor Plaintiffs - Appellees,	)	
v.	)	**Appeal from the United States District Court for the Southern District of Texas**
THE CITY OF HOUSTON; et al. Defendants,	)	
SAM NUCHIA, Chief; RICHARD J. PFEIL; A. WADE RUNNELS; C.O. BRADFORD; ROBERT T. FLEMING; J.R. JONES Defendants - Appellants	)	

Appeal from the United States District Court for the
Southern District of Texas

Before POLITZ, Chief Judge, JONES and DUHE, Circuit Judges.

5th Circuit Opinion (filed 10/5/98)

DUHE, Circuit Judge:

Defendants appeal from the denial of summary judgment on the following claims: violation of the First Amendment (42 U.S.C. § 1983), 42 U.S.C. § 1985, tortious interference with business relations, and intentional infliction of emotional distress. The Defendants, all employees of the Houston Police Department ("HPD"), appeal the denial of their motions for summary judgment based on their qualified immunity. We affirm in part and reverse in part.

BACKGROUND

The Plaintiffs, Debbie Benningfield ("Benningfield"), Pamela Grant, ("Grant"), and Peggy Frankhouser ("Frankhouser"), are all current or former employees of the Houston Police Department. The Defendants, Sam Nuchia ("Nuchia"), Richard J. Pfeil ("Pfeil"), A. Wade Runnels ("Runnels"), C.O. Bradford ("Bradford"), Robert T. Fleming ("Fleming"), J.R. Jones ("Jones"), are current or former employees of the Houston Police Department. In the mid-1980's, the Plaintiffs, who worked in the Identification Division ("ID"), complained of discrimination and a hostile working environment. Audra Runnels, then head of the ID, was allegedly forced to resign because of the Plaintiffs' complaints.

A. Wade Runnels, Audra Runnels's son, became the new head of ID. Allegedly, the discrimination and hostile working environment in the ID continued. According to the Plaintiffs, Runnels sought to avenge his father's termination with a campaign of retaliation against them. In addition, the Plaintiffs allege that Runnels and the other Defendants

harassed and retaliated against them because they continued to report problems in the ID.

Grant contends that the Defendants' actions led to her involuntary retirement. In 1989, Runnels assigned Grant to work under Fleming. According to Grant, she was involved in a romantic relationship with Fleming that ended in the early 1980's when she learned that Fleming had sexually abused her daughter. Grant alleges that when Runnels assigned her to work under Fleming, he knew of this relationship and the reason it ended. Grant maintains that, in addition to other harassment in the ID, being forced to work under Fleming caused her emotional breakdown in 1991 and led to her medical retirement.

Frankhouser and Benningfield contend that the Defendants conducted a campaign of harassment and retaliation against them. Frankhouser maintains that she was constructively discharged because the Defendants' actions created a hostile work environment. Among other things, Frankhouser claims that Runnels and Fleming stripped her of her cadet training position at the Police Academy. In 1993, she retired from the HPD and accepted a similar position with the Montgomery County Sheriff's Department.

Benningfield alleges, among other things, that she was demoted and formally reprimanded in retaliation for her grievances. Benningfield still works for the HPD.

Benningfield sued the individual Defendants and the City of Houston in state district court. Frankhouser and Grant subsequently intervened as plaintiffs. The Plaintiffs' claimed, under Texas law, discrimination, retaliation, intentional

infliction of emotional distress, tortious interference with business relations, defamation, premises liability, and invasion of privacy. The Plaintiffs later amended their complaint to include a First Amendment claim under 42 U.S.C. § 1983 and a 42 U.S.C. § 1985 conspiracy claim.

The Defendants removed the case to federal court and moved for summary judgment based on qualified immunity. The district court denied summary judgment with regard to the § 1983, § 1985, tortious interference, and intentional infliction of emotional distress causes of action. The other claims were either dismissed by the court or withdrawn by the Plaintiffs. The individual Defendants appeal.

DISCUSSION

I. Jurisdiction

Under Nerren v. Livingston Police Dept., we have interlocutory jurisdiction to take, as given, the facts that the district court assumed when it denied summary judgment and determine whether these facts state a claim under clearly established law." 86 F.3d 469, 472 (5th Cir. 1996) (quoting Johnson v. Jones, 115 S.Ct. 2151, 2159 (1995)). This interlocutory jurisdiction applies to both the federal and state law claims. See Cantu v. Rocha, 77 F.3d 795, 804 (5th Cir. 1996) (stating that "orders premised on the denial of qualified immunity under Texas state law are appealable in federal court to the same extent as district court orders based on the denial of federal law immunity"). The standard of review is *de novo*. See Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994) (citing Mozeke v. International Paper Co.,856 F.2d 722, 724 (5th Cir. 1988)). Considering the facts

that the district court assumed, we now consider each of the causes of action to determine which, if any, of the Plaintiffs' claims state a claim under clearly established law. For those that do we then consider whether issues of fact are present.

II. First Amendment

A First Amendment retaliation claim must include facts showing (1) that the employee's speech involved a matter of public concern, (2) that the employee suffered an adverse employment action for exercising her First Amendment rights, and (3) that the employee's exercise of free speech was a substantial or motivating factor in the adverse employment action. See Harrington v. Harris, 118 F.3d 359, 365 (5th Cir. 1997).

A. Matter of Public Concern

Connick v. Myers teaches that "whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." 103 S.Ct. 1684, 1690 (1983). The Court noted that "when employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." Id. The Court stated that review by a federal court is improper where the speech involves matters of solely personal interest. See id.; Ayoub v. Texas A & M University, 927 F.2d 834, 837 (5th Cir. 1991) (holding that a professor's complaint about a discriminatory

pay scale was not a matter of public concern where the professor's complaint focused on his individual compensation).

The fact that an employee's speech contains an element of personal interest is not fatal, however. See Thompson v. City of Starkville, Miss., 901 F.2d 456, 463-65 (5th Cir. 1990). An employee's speech may contain a mix of public and private concerns. See id. at 464. In Starkville, a police officer protested improper promotions by filing grievances and aiding others in filing grievances. This court held that the officer's speech constituted a matter of public concern because his allegations of police misconduct brought attention to matters beyond purely personal interest.

Similarly, the present case involves a mix of public and private speech. Personal concerns certainly played a major role in the Plaintiffs' grievances. The Plaintiffs thought that their personal careers were being negatively affected by mismanagement, gender discrimination, and a hostile work environment.

The Plaintiffs' speech, however, contained matters of public concern as well. The Plaintiffs complained about contamination of criminal histories in the ID. According to the Plaintiffs, contamination involves the wrong criminal histories being attributed to individuals. The Plaintiffs maintain that the problems with the criminal histories resulted from mismanagement and, in some instances, deliberate tampering. The integrity of and tampering with criminal histories are important to effective law enforcement and certainly a matter of public concern. See Brawner v. City of Richardson, Texas, 855 F.2d 187, 191-92 (5th Cir. 1988)

(stating that "[t]he disclosure of misbehavior by public officials is a matter of public interest and therefore deserves constitutional protection, especially when it concerns the operation of a police department").

The fact that the Plaintiffs chose to file internal grievances rather than publicize their complaints is not dispositive. In Givhan v. Western Line Cosol. Dist., the Court stated:

> The First Amendment forbids abridgment of "freedom of speech." Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment.

99 S.Ct. 693, 696-97 (1979); See also Wilson, 973 F.2d at 1270(citing Givhan, *99* S.Ct. at 696-97); Thompson, 901 F.2d at 46667 (stating that the fact that the plaintiff complained to his superiors rather than the public did not preclude a finding that his speech dealt with matters of public concern).

B. Adverse Employment Actions

"Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands." Pierce v. Texas Department of Crim. Justice, Inst. Div., 37 F.3d 1146, 1149 (5th Cir. 1994) (citing McCabe v. Sharrett, 12 F.3d 1558, 1563 (llth Cir. 1994)).

See also Harrington v. Harris, 118 F.3d 359, 365 (5th Cir. 1997). In Pierce, the court declined to expand the list of actionable adverse actions, noting that some things are not actionable even though they have the effect of chilling the exercise of free speech. Pierce, 37 F.3d at 1150.

Officer Grant has failed to establish a causal connection between speech on matters of public concern and the adverse employment actions she alleges.[1] For example, Grant was given a medical discharge after she suffered an emotional breakdown. Grant alleges that she was discharged in retaliation for her grievances. The evidence, however, indicates that Grant's medical retirement came as a result of an independent psychiatric evaluation. Grant has, therefore, failed to state a First Amendment violation.

Benningfield and Frankhouser allege many acts of alleged retaliation, most of which are insufficient to constitute adverse employment actions. Benningfield alleges that she was falsely accused of stealing criminal history records. Similarly, Officer Frankhouser alleges that she was falsely accused of attempting to sabotage the fingerprint identification system. Assuming that these allegations are true, mere accusations, without more, are not adverse employment actions. Cf. Harrington, 118 F.3d at 366 (holding that criticism did not constitute an adverse employment action).

---

[1] Grant's brief alleges that she was offered a day shift position to withdraw her grievance. Her brief fails to reference specific evidence in the record supporting this claim, however, and our review of the record has found none.

Benningfield maintains that she was subjected to an IAD investigation in retaliation for her First Amendment activity.[2] Although a reprimand can constitute an adverse employment action, an investigation does not. See Pierce, 37 F.3d at 1150 (stating that an investigation, by itself, was not an adverse employment action). Benningfield also alleges that she was referred to the Administrative Personnel Committee ("APC") to undergo psychological testing to determine her fitness for duty. The APC referral was not an adverse employment action. Rather, the referral was designed to gather facts to form the basis for an employment decision.

Frankhouser maintains that her job performance rating was lowered in retaliation for her grievances. However, she admits that it was returned to its previous level two days after it was lowered. This does not constitute an adverse employment action.

Benningfield alleges that she was prevented from attending certain conferences in retaliation for filing grievances. We rejected a similar claim in Dorsett v. Bd of Trustees for St. Colleges & Univ. 940 F.2d 121, 123-24 (5th Cir. 1988). In Dorsett, we found the plaintiff's complaints about teaching assignments, administrative matters, and departmental procedures insufficient to constitute adverse

---

[2] There is substantial evidence in the record indicating that Benningfield was investigated because she was away without leave for three days. For the purposes of this appeal, however, we will assume that her allegations are true.

employment actions. We stated that "[w]e have neither the competency nor the resources to micro manage the administration of thousands of state educational institutions." Id. at 124. Similarly, deciding whether an officer may attend certain conferences would constitute needless micro management of the HPD. Frankhouser makes claims which fail for the same reason. She contends that she was assigned an unusually heavy work load and has not received overtime and travel reimbursement due her. She also alleges that the Defendants inhibited the performance of her duties by preventing Printrak representatives from speaking directly with her. These allegations involve administrative matters and are not adverse employment actions. See id.

Benningfield maintains that transferring her to the night shift constituted an adverse employment action. Merely changing Benningfield's hours, without more, does not constitute an adverse employment action. A transfer may also constitute a demotion. See Forsyth v. City of Dallas, 91 F.3d 769, 774 (5th Cir. 1996); Click v. Copeland, 970 F.2d 106, 110 (5th Cir. 1992). However, the transfers in Forsyth and Click involved more than mere changes in working hours and are, therefore, distinguishable.

Benningfield maintains that she was threatened with discharge and promotional pass over unless she withdrew her EEOC complaint. However, her brief fails to point to specific evidence in the record supporting this assertion. Our review of the record revealed none.

Benningfield alleges that she was formally reprimanded because of her First Amendment activities. Formal reprimands constitute adverse employment actions.

See Pierce, 37 F.3d at 1149. The Defendants argue that Benningfield was reprimanded because she was away without leave ("AWOL") for three days. Benningfield maintains that her grievances are the real reason for her reprimand and that the AWOL incident is merely pretextual. However, the reprimand was rescinded through internal HPD procedures and, thus, does not constitute an adverse employment action.

Frankhouser alleges that she was verbally reprimanded. She has failed, however, to present any evidence that these "reprimands" were anything more than mere criticisms. See Harrington, 118 F.3d at 366 (holding that criticism did not constitute an adverse employment action). Thus, Frankhouser's allegations of verbal reprimands fail to state a claim.

In her affidavit, Benningfield states that Runnels demoted her while the internal affairs investigation took place. Benningfield affirms that, prior to the demotion, she was the AFIS Manager. She avers that Runnels took away her managerial title and required her to report to Pfeil. See Click, 970 F.2d at 110. The fact that Benningfield's complaints resulted in the removal of Runnel's father tends to support Benningfield's claim that the demotion was a response to Benningfield's grievances.

The Defendants claim, however, that Benningfield was required to report to Pfeil because of an audit recommendation and Benningfield's AWOL incident. The audit recommendation is included in the Defendant's summary judgment evidence.

In her affidavit, Frankhouser states that Runnels and

Fleming stripped her of her cadet training position at the Police Academy. This action is arguably a demotion. See id. Frankhouser's affidavit indicates that she complained of mismanagement, harassment, and retaliation in the ID. This evidence suggests that she was stripped of her training position because of her First Amendment activities.

Norbert LeBlanc ("LeBlanc"), a retired HPD officer, corroborates Benningfield's and Frankhouser's claim that they were demoted for exercising their First Amendment rights. LeBlanc affirms that he personally witnessed discrimination and retaliation by the Defendants, particularly Runnels and Fleming. LeBlanc further affirms that Runnels and Fleming retaliated against him for supporting Benningfield and Frankhouser by writing "scathing" letters to Management Review about him and putting a negative mark in his file.

There are genuine issues of material fact as to whether Benningfield and Frankhouser were demoted, and, if so, whether it was in retaliation for exercising their First Amendment rights. Summary judgment should be used "most sparingly in . . .First Amendment case[s] . . .involving delicate constitutional rights, complex fact situations, disputed testimony, and questionable credibilities." Porter v. Califano, 592 F.2d 770, 778 (5th Cir. 1979). Accordingly, the denial of summary judgment is affirmed with regard to the alleged demotions of Benningfield and Frankhouser.

Benningfield's promotion was delayed for two years. The Defendants maintain that the delay was not retaliation for Benningfield's First Amendment activities. Rather, they argue that the promotion was held up because of a delay in administering a required test. Further, the Defendants contend

that Benningfield received retroactive pay and seniority because the test was given late. Although a refusal to promote is an adverse employment action, these facts merely indicate a delay in promotion. See Pierce, 37 F.3d at 1149 (stating that adverse employment actions include refusals to promote). We need not address whether a mere delay in promotion constitutes an adverse employment action because Benningfield received the promotion with retroactive pay and seniority.

Frankhouser maintains that she was constructively discharged. To prove a constructive discharge, Frankhouser must show that a "reasonable person in [her] shoes would have felt compelled to resign." Landgraf v. USI Film Products, 968 F.2d 427, 429 (5th Cir. 1992) (quoting Bourque v. Powell Electrical Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980)). Further, a constructive discharge claim requires a "greater severity or pervasiveness of harassment than the minimum required to prove a hostile work environment." Id. at 430 (citing Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071, 1077 (5th Cir. 1981).

Frankhouser has not produced evidence showing that a reasonable person in her shoes would have felt compelled to resign. In fact, Benningfield, who alleges a much greater degree of harassment and retaliation than Frankhouser, is still working for the HPD. Frankhouser essentially contends that she resigned because she believed that she would be the next target of retaliation. Frankhouser's fear of future retaliation is not sufficient to support her claim of constructive discharge.

C. Qualified Immunity

In Click v. Copeland, rejecting a police officer's qualified immunity defense, we stated that "a reasonable officer should have known that if he retaliated against an employee for exercising his First Amendment rights, he could not escape liability by demoting and transferring the employee rather than discharging him." 970 F.2d 106, 111 (5th Cir. 1992). Similarly, in this case, we hold that the Defendants should have known that they could not retaliate against Benningfield and Frankhouser for exercising their First Amendment rights.

III. §1985 Claims

The Plaintiffs assert that the Defendants conspired to interfere with the performance of their duties and to deprive them of their rights and privileges under the law. §1985(1) applies in cases of interference with federal officials in the performance of their duties. §1985(1) is not applicable to state officials. See Canlis v. San Joaquin Sheriff's Posse Comitatus, 641 F.2d 711, 71718 (5th. Cir. 1981); Baron v. Carson, 410 F.Supp. 299, 300-01 (N.D.1ll. 1976); See also Congress of Racial Equality v. Clemmons, 323 F.2d 54, 63 (5th Cir. 1963) (stating that city officials had no federal right to be protected in the performance of their municipal duties). The Plaintiffs are not federal officials and, therefore, their allegations fail to state a claim under §1985(1).

The Plaintiffs allege that the defendants conspired to deprive them of their First Amendment and equal protection rights. Under §1985(3), a corporate entity and its employees constitute a "single legal entity which is incapable of conspiring with itself." Hilliard v. Ferguson, 30 F.3d 649, 653 (5th Cir. 1994) (holding that a school board and its

employees constituted a single legal entity which could not conspire with itself for § 1985(3) purposes).[3]

A possible exception to the intra corporate conspiracy doctrine exists where corporate employees act for their own personal purposes. See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 486 n.5 (5th Cir. 1984); H & B Equipment Co., Inc. v. International Harvester Co., 577 F.2d 239, 244 (5th Cir. 1978). The Plaintiffs allege that Runnels's father was forced to resign because of their grievances and, therefore, Runnels had a personal motive for retaliating. Further, the Plaintiffs maintain that the other Defendants conspired with Runnels and aided in the retaliation.

Assuming the allegations of a personal motive are true, the Plaintiffs fail to state a claim under § 1985(3). In Hilliard, the court stated that, under § 1985(3), plaintiffs must show that the alleged conspiracy was motivated by class-based animus." 30 F.3d at 653. Here, the Plaintiffs' allegations fail to show that the purported conspiracy was motivated by class-based animus. Rather, the Plaintiffs' § 1985(3) claim is based on the theory that Runnels' desire to get even with those who forced his father to resign was the motivation for the conspiracy.

---

[3] The plaintiffs' reliance on Dussouy v. Gulf Coast Inv. Corp. is misplaced. 660 F.2d 594, 603-04 (5th Cir. 1981). In Dussouy, the court questioned the intra corporate conspiracy doctrine in dicta. However, the court had no occasion to rule on the vitality of the intra corporate conspiracy doctrine because Dissouy was a diversity case involving Louisiana law. See id. at 596, 602-04.

IV. Tortious Interference with a Business Relationship

The Plaintiffs' allegations fail to state a claim for tortious interference with business relations. Generally, as agents of the city, the Defendants cannot be liable for interference with the city's contracts. See Holloway v. Skinner, 898 S.W.2d 793 (Tex. 1995). An agent may be liable, however, where he acts in furtherance of his own personal interests. See id. In Holloway, the court stated that, in order to prove personal interest the "plaintiff must show that the defendant acted in a fashion so contrary to the corporation's interests that his actions could only have been motivated by personal interests." Id. Proof of mixed motives is insufficient to create liability. See id.

In this case, the Plaintiffs fail to allege facts showing that the Defendants' actions could only have been motivated by personal interests. At best, the Plaintiffs' contentions indicate that the Defendants acted with mixed motives and are, therefore, legally insufficient.

V. Intentional Infliction of Emotional Distress

The district court granted the Defendants motion for summary judgment with regard to Frankhouser on the issue of intentional infliction of emotional distress. This appeal involves only Grant and Benningfield's intentional infliction of emotional distress claims. The elements of intentional infliction of emotional distress are: (1) the defendant acted either intentionally or recklessly; (2) the conduct was extreme or outrageous; (3) the defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress was severe. See Ugalde v. W.A. McKenzie Asphalt Co., 990 F.2d 239,

243 (5th Cir. 1993) (citing Dean v. Ford Motor Credit Co., 885 F.2d 300, 306 (5th Cir. 1989)).

Grant's allegations are sufficient to withstand summary judgment with regard to Runnels. Grant affirms that Runnels assigned her to work under Fleming knowing that Grant and Fleming had been romantically involved and that the relationship ended when Grant discovered that Fleming had sexually abused her daughter. When Grant attempted to shield her work station from Fleming's constant view by putting partitions around her work area, Runnels allegedly removed the partitions in order to cause Grant emotional distress. Grant concludes that Runnels's actions led to her emotional breakdown and subsequent medical discharge.

In their affidavits, Benningfield and Frankhouser corroborate Grant's claim. Benningfield affirms that during Grant's emotional breakdown, Grant exclaimed "I can't take this anymore. What are they going to do to me next?" Frankhouser avers that she personally witnessed retaliation against Grant.

Memos written by Runnels and Fleming tend to support Grant's claim that her injury was caused by Runnels's actions.[4] Runnels's memo notes that the Staff Psychologist, Beverly Nichols, concluded that Grant suffered from work related stress. In addition, the memo states that, following an investigation, Grant's Injury on Duty (IOD) status was approved. In his memo, Fleming admits that Grant sustained

---

[4] Runnels's and Fleming's memos are attached to Grant's affidavit as Exhibits B-2 and B-3, respectively.

a psychological injury on the day Runnels allegedly removed the partitions around her desk. Fleming also concedes that Grant was ruled IOD and, thus, her injury claim was covered by Workmen's Compensation.

Requiring an employee to work under a supervisor she dislikes would not ordinarily constitute outrageous conduct. See Wilson v. Monarch Paper, 939 F.2d 1138, 1143 (5th Cir. 1991) (noting that, in most cases, intentionally creating an unpleasant work environment does not constitute outrageous conduct). In this case, however, Grant alleges that Runnels assigned her to Fleming, knowing that Fleming sexually molested her daughter. See id. (holding that forcing a corporate executive to perform menial janitorial duties constituted outrageous conduct). Further, Texas immunity law does not protect Runnels because he allegedly acted in bad faith. See Cantu v. Rocha, 77 F.3d 795, 804 (noting that public officials must act in good faith in order to enjoy immunity under Texas law). Accordingly, we affirm the district court's denial of summary judgment as to Runnels because a genuine issue of material fact exists.

On the other hand, Grant's allegations fail to state a claim against the other Defendants because their purported actions are not sufficiently extreme and outrageous. Similarly, Benningfield's contentions fail to state a claim for intentional infliction of emotional distress against any of the Defendants.

Aside from Runnels's treatment of Grant, Benningfield and Grant allege conduct which does not constitute extreme and outrageous conduct under Texas law. See id. at 1143(creating an onerous and unpleasant work environment does not usually constitute intentional infliction of emotional distress); Ugalde,

990 F.2d at 243 (calling an employee a "Mexican" and a "wetback" is not extreme and outrageous conduct).

CONCLUSION

With regard to the Plaintiffs' § 1985 and tortious interference claims, we reverse the district court.

We affirm the district court's denial of summary judgment on Benningfield's § 1983 claim that Runnels demoted her while the internal affairs investigation was proceeding and on Frankhouser's claim [against Runnels and Fleming] that she was demoted by being removed from a cadet training position at the Police Academy. We also affirm the denial of qualified immunity as to those claims. The district court's denial of summary judgment is reversed with regard to the other § 1983 claims.

We affirm the district court's denial of summary judgment on Grant's intentional infliction of emotional distress claim against Runnels. The court's denial of summary judgment is reversed with regard to the remaining intentional infliction of emotional distress claims.

REVERSED in part; AFFIRMED in part and REMANDED.

APPENDIX B

[Filed April 16, 1997]

Cause Number: 95-5473

Style: Debbie L. Benningfield, et al. v. The City of Houston, et al.

Appearances:

Counsel:	Representing:
Joan Bain	Plaintiff
Brian Begle/Vivian Kraft/Elizabeth Trevino	Defendant

Date: April 11, 1997 Ct.Report: E. Reed
Time: 4:45 p.m. - 6:30 p.m.

At the hearing the Court made the following rulings:
Defendants' Motion for Summary Judgment [Doc # 29] is GRANTED IN PART/DENIED IN PART for reasons stated on the record in open Court. The Magistrate Judge's Memorandum and Recommendation is adopted in limited respects and is modified in the manner stated on the record in open court.

The parties must submit a joint chronology, as set forth on the record in open court. Parties should not include work product in the chronology. Plaintiff shall provide a copy to Defendants for their review and additions, if any, prior to submission of the chronology.

Plaintiff to submit briefing within two weeks as to the City of Houston's liability on tort claims, intentional infliction and tortious interference. Briefing schedule established. Court's rulings on individual Defendants' liability for intentional torts and application of official immunity are without prejudice.

Court orders parties to re-mediate this case unless Defendants provide the Court in writing reasons why mediation would not be appropriate. This submission may be under seal. Mediation should be attended by all named parties and the City Attorney. It should be conducted by former U.S. District Judge James DeAnda. Defendants must pay for the mediation. All proceedings at the mediation are confidential and privileged and may not be disclosed to anyone by any participant for any reason.

Deponent Jan Rich must respond in writing on e week to Plaintiff's Motion to Compel. Parties are to serve Rich's counsel with a copy of this order immediately.

Court sets trial for September 8, 1996, at 9:00 a.m.

The Clerk will file these Minutes and Order and provide copies to the parties.

SIGNED at Houston, Texas this 11th day of April, 1997

/s/_____
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[April 11, 1997]

DEBBIE L. BENNINGFIELD	)	
	)	
v.	)	**HEARING**
	)	
THE CITY OF HOUSTON	)	

HEARING
BEFORE THE HONORABLE NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs, Debbie Benningfield, Peggy Frankhouser, and Pamela Grant:

Ms. Joanie Bain
Bain & Bain
1535 West Loop South, 4th Floor
Houston, Texas 77027

For the Defendant, City of Houston:

Mr. Brian J. Begle
Ms. Elizabeth Trevino
Ms. Vivian M. Kraft
901 Bagby, 5th Floor
Houston, Texas 77251

Court Reporter:

Ed Reed
515 Rusk, Suite 8016
Houston, Texas 77002

Proceedings recorded by computer stenography Produced by computer-aided transcription

THE COURT: Benningfield. This case is No. 95-5473. Would counsel state their names and appearances, please?

MS. BAIN: Joanie Bain for the plaintiffs, Debbie Benningfield, Pamela Grant and Peggy Frankhouser.

MR. BEGLE: Frank Begle for the defendants.

MS. KRAFT: Vivian Kraft for the defendants.

MS. TREVINO: Elizabeth Trevino for the defendants.

THE COURT: Okay. I'm the beneficiary of a memorandum and recommendations by Magistrate Judge Botley. However, I see the case differently than he does. I do have some questions for you all before I get into any rulings. I am not going to write on this, I don't think.

There's a Motion for Summary Judgment pending, which was weighty, and Magistrate Judge Botley did make some rulings that I agree with, but I don't agree with all of them. And so I have not issued an order adopting it.

First of all, by way of background, I'd like to know if either side has a factual chronology. The reason I ask in part is the plaintiff referred to one, but we couldn't physically locate it in the file.

MS. BAIN: There is -- yes, Your Honor, I filed it twice now. It's called the Corrected Joint Statement of fact.

THE COURT: We have that.

MS. BAIN: That is a chronological effort, an effort to put in chronological order the facts that form the basis of the complaint. If you're talking about a summary chronologically, I do have that as well, but not with me today.

THE COURT: Okay. Well, we do have or the Court has that joint factual statement or whatever you're calling it, and, in fact, have used it. So, in that sense, the question is answered. I think it would be very helpful for us to have a more summary document.

MS. BAIN: I can submit one, if you would like.

THE COURT: All right. I would like that. And if the defendant has objections to that document, feel free to retype it or get it to her from disk, and then you can put in a different kind of typeface addition. It's not evidence. This is merely an aid to me for finalizing my rulings in this case.

Summary judgment, as you know in part, has been denied, and that is the bottom line. It's going to be denied in part again. The parts are not all identical, however. So we are going to set you all for trial today, but I'm a little tentative on some of the causes of action, and I'm going to explain to you where and how. But the chronology for our benefit would be helpful, even if it's just in connection with the trial as sort of an outline so I understand where we're going. It's not evidence, it's argument and therefore I will allow both sides to put argument into that same document.

The Plaintiff, if you don't mind giving us the first cut at it, anything that's already in that one you've mentioned, you can take out if you choose.

MS. BAIN: I'm going to need to, it's got some work product in it, but I will try to do it as quickly as possible. It's also probably more detailed than the Court would want. I'm going to try to cut it down to just the major events, because it is very detailed.

THE COURT: I can imagine you need it for other purposes, okay.

The magistrate judge looked at this whole case through the lens of immunity, and I am -- I guess I understand why he did that, but I think that I need to go at it differently, and that is that I'm going to look at these claims on their merits. I don't think that the immunity claim is one that gives rise to a summary judgment for the defendant, because under Johnston versus the City of Houston, 14 F.3d 1056 (5th Circuit 1994), summary judgment is inappropriate unless plaintiff's version of the violations does not implicate clearly established law. There are causes of action in here that do implicate clearly established law, if plaintiff can prove her case -- their cases.

Now, I find a genuine question of material fact as to whether or not the various defendants' actions were reasonable in regard to certain claims. And so summary judgment on the immunity ground is not appropriate in my opinion. Also see Cantu versus Rocha, 77 F.3rd 795 (5th Circuit 1996). The objective reasonableness as to the behavior or the conduct of the defendants in light of complaints being made by the plaintiffs. In my mind, it's a question of fact and therefore I don't think I can grant summary judgment on the immunity ground.

Now, the magistrate judge also confused me a little bit

as to what claim survived as to discrimination.

Reading your underlying briefing, I am now -- and your objections and responses and whatnot, I now understand that the plaintiff is -- plaintiffs are relying on the TCHRA, the Texas Commission on Human Rights Act, not Title 7.

MS. BAIN: Yes, but Texas Commission --

THE COURT: It's the same.

MS. BAIN: Same thing, yeah.

THE COURT: It's interpreted the same, but for some reason not Title 7.

MS. BAIN: This case was originally filed in state court.

THE COURT: Why was there never an amendment to add Title 7 just for the heck of it?

MS. BAIN: You can't recover under both. I think in the original complaint in both of them, it alleges discrimination and it specifies Texas Commission on Human Rights Act.

There is Supreme Court authority, if for some reason the Court deems Texas Commission on Human Rights Act is -- time limits are a little bit different or inappropriate, when Title 7 can step in. But you really can't recover on both and you can't submit issues on both. So that's why.

THE COURT: Anyway, plaintiff's claims to that

extent, as I understand it, and as I think the defendant understand it, those claims, to the extent they are not barred by statute limitations still need to go to trial.

MR. BEGLE: That's my understanding, Your Honor.

THE COURT: Okay. Do your companions think that, too?

MS. BAIN: I'm sorry, I lost you on that last statement.

THE COURT: The Texas Commission on Human Rights Act claim does still to need to go to trial. That's my opinion, but I'm basing it in part on the fact that the defendants' briefing seems to suggest that is also the defendants' view as well.

MR. BEGLE: Yes, that was pursuant to Judge Botley's recommendation. That was his finding.

THE COURT: Oh, I see.

Okay. Well, I didn't think that -- okay. Let's just leave it. As I understand it, those claims are still alive. And the TCHR claims are not, in my opinion, viable against the individual defendants.

MS. BAIN: Your Honor, I think the holding of the magistrate and the assertion was for a Section 1983 liability and a 14th amendment claim.

THE COURT: That's not viable, either, but I know -- I have -- my views are that the TCHR claim is not viable

against the individual defendants in their individual capacity. And I rely for that purpose on Stults, S-t-u-l-t-s, versus Conoco, 76 F.3rd 651, 655 (5th Circuit 1996). It's an ADEA claim, but I think it's comparable and Grant versus Lone Star, 21 F.3rd 649, at 652-653. There is also the old Garcia versus Elf Atochem case, 28 F.3rd 446, F450-51 (5th Circuit 1994).

So the TCHRA claims against the individual defendants are dismissed. To the extent the plaintiff has brought a claim for sexual discrimination per se, pursuant to Section 1983, I think that the Jackson case versus I think the City of Atlanta, 73 F.3rd at 63 & n., note 13 precludes that claim in light of the viability as a matter of law of the TCHR claim, at least at the point of summary judgment.

So the Section 1983 claims by each of the plaintiffs for the per se sex discrimination is dismissed.

Now, there has also been argued about a plaintiff's section 1983 claim regarding the deprivation of liberty or property. I did not see these --

MS. BAIN: And First Amendment.

THE COURT: Holding that one out separately, I did not see the liberty or property claims adequately pled in the complaints. There is some very general language, but in my mind that is not adequately pled by any means.

I am going to dismiss those claims. I don't think that they've been pled and I think the summary judgment is too late to bring that in. So that seems to have been the -- there seems to have been no addressing of that in the magistrate's

ruling, but that is my view.

I would like to also comment that the City of Beaumont versus. Bouillion, B-o-u-i-l-l-i-o-n, 896 S.W. 2d, 143 at 147 (Texas Supreme Court 1995) is an issue in regard to the state version of these property and liberty interest claims. I don't think that plaintiffs survive the state claim on that basis.

The tortious interference claim raises significant questions for me, however. I am not comfortable with that claim, but I'm not comfortable dismissing it, either. In other words, I don't think that the law is intended, that is the common law or any other Texas law is intended for this application within an employment context of employees suing her or their supervisors.

However, in analyzing the cases that talk about the dual role of a corporate agent, I need to look at the factor of whether the defendant acted in a fashion so contrary to the corporation's best interests that his actions could. only have been motivated by personal interests. This ties into the element -- the second element of this cause of action, that is the occurrence of an act or interference that was willful and intentional.

In order to establish that second element, plaintiff does need to prove more than that the defendants benefitted from the breach and must prove the willfulness of the conduct to serve the defendants' personal interests at the expense of the corporation. And these quotes or paraphrases are from the Holloway v. Skinner case, 898 S.W. 2d at 796 and 798.

I am reluctant to dismiss this claim. I don't feel that I can or should make an assessment of these elements on summary judgment. But I need to tell the plaintiff that the evidence would have to be very strong to meet this test. And personally benefitting is where I'm really having a problem, because I think that they could have been malicious or they could have been really stupid or they could have been trying to protect themselves without thinking of the expense, if you will, of the City in this case.

In any event, this cause of action does surprise me. On the surface, I would think it would not stand, it would not be viable in the Fifth Circuit or the Supreme Court of Texas. But because the element is so subjective with intent and whatnot, I'm definitely unprepared to dismiss that cause of action at this time. There are matters within the pleadings of the plaintiffs that are surprising for why, as pled and as alleged in affidavits and depositions and whatnot. It just leaves you, the reader, clueless as to what management these individuals Bradford and the pecking order of supervisors could have been thinking. And I, having said that, the affidavits and the joint statements supply sufficient evidence to raise a genuine question of material fact on this intent element. And therefore, I feel that summary judgment is inappropriate.

I have not found a case in which this cause of action again has been applied in the employment setting. It has been applied in the agency setting.

MS. BAIN: I think the new Austin Court of Appeals cases.

THE COURT: That they mentioned may apply. So, I

mean, I just wasn't going to race into a decision on this one is my point. I want to express -- if you're going to do any negotiations, I wanted, to express my concerns on this and give you a flavor for it, because this does seem like a straight sex discrimination retaliation kind of case, and this application here seems forced to me. But I do not think it should be decided on summary judgment, and that's the bottom line.

I will note again for the record B. Inc. The B. Inc. v. Miller Brewing Company, 663 F.2d 545 (5th Circuit 1991) at 553 and 554 indicates that a fact question exists in this regard. And in a case that's somewhat similar, not directly on point, but it doesn't deal with tortious interference.

Also, I've looked at, for your edification, Johnson versus Randall's Food Market, 869 F.2d 390, F400. That's the Texas Court of Appeals, Houston, 1993 reversed on other grounds, which would indicate how thin the cause of action very well may be.

But I have also looked at Martinez versus Hardy, 864 S.W. 767 at 775 (Texas Court of Appeals, 14th District 1993) holding there was no intervening third party.

But also see Simpson versus Plano I.S.D., 743 S.W. 2d 944, 945.

In any event, these are cases you've largely cited to me. But that's where I come out.

With respect to the statute of limitations on Grant's tort claims, Judge Botley held that there was a genuine question of fact. He focused in his opinion on this submission

of the termination document to TCLEOSE, T-C-l-o-s-e, maybe it's
e-o-s-e.

But in any event, I have looked at the subsequent information submitted by the defendants. I guess I'm left with this question for you. Why is this dispositive? In the record before me on-summary judgment there are other actions within two years or less, frankly. The suit was filed in August of '93, Grant intervened in April '94.

Assume that the report was not a wrongful act, but a required -- requirement of statute, by statute. The two-year period goes back to at least April '92, and there are a variety of actions that are complained of by Grant during that period April '92 through at end of her employment. Why are you not focusing on that? I mean, how do you avoid that, I should say?

MR. BEGLE: Your Honor, I wasn't aware that those were alleged wrongful acts within the time period. That was the focus of the response was that that was the act that brought these back in, and that's why I focused on it.

THE COURT: I understand that, and I know why you submitted that additional evidence. But it's for this reason that I'm not adopting the M and R as written, among others. But, for instance, I'm looking for some notes of I have.

Runnels -- I'm having a little trouble with the dates here. But the tail end of things that went on, assuming it's all chronological, the tail end of what Grant is complaining of, such as Jones' recommendations to Nuchia about that she be

referred to a psychiatrist or psychologist, Nuchia misrepresents that Jones recommended that Grant be relieved of duty, failure to give due process protections, if that was the case. Nuchia calls Wood, Bradford and Jones tells him don't interfere -- something -- regarding wife.

June '92, Smith calling Grant at home, telling her to report to IAD to be relieved of duty. The City contracts with Cox. Well, the psychological exam happened after. That's not wrong. The City's ignoring the result is arguably a problem, because apparently Dr. Cox concludes Grant suffers from some sort of stress disorder relating to the harassment, and says she should work elsewhere or could work elsewhere.

Then there is this 48-hour business with respect to the notice to the IAD to provide a written explanation regarding the badge and Runnel's dealings with that.

Bottom line is, I will assume for the moment that the TCLEOSE submission was not a wrongful act. Plaintiff disputes that. I don't know. I don't need to reach that question. I think that Grant's claims from April '92 onward would be actionable. And on this summary judgment record, I cannot hold that no wrongful act occurred within that time period such that her claim is statutorily barred.

Now, there may be some failure to exhaust issues, some other things around, but based on the record as I review it, I'm not prepared to dismiss her claim. So that recommendation is adopted, but for different reasons.

As to the speech, this is another claim which does give me cause. But the plaintiff has alleged and submitted evidence

sufficient to survive summary judgment. The law is clearly established and was clearly established in 1988, according to the Fifth Circuit, that a reasonable officer should have known that if he retaliated against an employee for exercising his First Amendment rights, he could not escape liability by demoting and transferring the employee rather than discharging him. The whole point of this is the exercise of the First Amendment rights has been known and held to be known and its protection has been held to be known for all the years relevant to this cause of action in this case.

I quoted Forsyth versus City of Dallas, 91 F.3rd 769 at 775 (5th Circuit 1995), quoting Click versus Copeland. I'll dispense with the cite.

There is also a case, Thompson versus City of Starkville, Mississippi, 901 F.2d 456 (5th Circuit 1990). Now, Judge Botley held that that case established that employment matters are not the subject of public concern. But in this case, I think he held that there was a triable issue. No, he held that there was not a triable issue. I do not agree with that ruling, despite my skepticism.

In this case, the plaintiffs have clearly alleged that they spoke out regarding inappropriate uses of the IAD process and concerning what I'll summarize as corruption or impropriety in the police department and that they voiced their complaints through appropriate channels about deliberate falsification and tampering with criminal history and lack of training of new personnel, which resulted in a contamination of criminal history. That's what they have alleged, and complained in the factual forces of this summary judgment record. These are matters of public concern and go beyond their own treatment,

and therefore plaintiff has joined issue on the summary judgment and adequately established there is a genuine question of material fact, even under the test that Botley used, which I think is a valid test, I might add.

I also will cite the parties to Vojvodich, V-o-j-v-o-d-i-c-h, versus Lopez, 48 F.3rd 879.

Now my question to you is, to the plaintiff, is this case being pursued under both state and federal constitutions or only federal? Because that --

MS. BAIN: The First Amendment claim?

THE COURT: First Amendment.

MS. BAIN: I think that Texas has held that there is not a private cause of action under the First Amendment. What we have alleged is a First Amendment claim in conjunction with a 1983 claim under the United States Constitution. The allegations -- the reference, I should say, to the state constitution is to indicate that the state constitution also recognizes the right of free speech.

THE COURT: But that's not an actionable claim. It's just --

MS. BAIN: Not in and of itself, no. It's a right, though, that they have been deprived of, which makes it actionable under Section 1983, because they are being deprived of a right under authority of state law purportedly. What I'm saying is --

THE COURT: But it doesn't add anything, does it?

MS. BAIN: It doesn't really add anything. It's just a right that exists. It's a right that they have been deprived on. The difference is that Texas in, I think it's Davenport versus Garcia is the case, has held at the Texas Supreme Court that the state First Amendment right is actually broader than the federal First Amendment right. So, if it becomes an issue in this litigation as to whether or not --

THE COURT: There is a right.

MS. BAIN: There is a right that they have been deprived of, there is a broader right recognized in Texas than under the U.S. Constitution. So I'm not trying to make it a separate cause of action. I'm saying it is a First Amendment right which they were deprived of.

THE COURT: Okay. Well, it's a little unclear, frankly, from the pleading. But to the extent that you are trying to allege a First Amendment right directly under the state constitution, you're not, but that would be dismissed.

MS. BAIN: I understand. I'm not alleging that.

THE COURT: And I think again it's the City of Beaumont versus Bouillion that requires that result.

But to the extent that I hear you arguing under the federal constitution or under 1983 importing the state First Amendment claim, I am not dismissing it. But I'm also not endorsing your latter theory, because I need to think about that. In other words, I'm not sure that importing the First

Amendment to 1983, importing it from the state constitution, would give you a separate or broader right than would exist at all. I'm simply not ruling on that one.

MS. BAIN: Okay.

THE COURT: But now I understand it.

Now, another claim is this negligent hiring and retention.

If the defense wants to sit down, this is going to take a few minutes. I'm sorry, I should have had you do that.

I need to know, Ms. Bain, from you, what this claim really is. In other words, it's not a hiring claim, I don't think.

MS. BAIN: It's not a claim. It's negligent supervision and negligent retention. I apologize for any misleading for the pleading. It's just one that's usually termed that way. Basically, the allegation is that there were several management reviews, all of which concluded that the substance of what the plaintiffs were asserting was correct.

The City was negligent in failing to address those concerns, failing to properly supervise, discipline and/or fire the perpetrators, and that based upon the fact that the upper echelon of the police department approved that and allowed it to go on, that it then becomes a policy or practice of the City and the City is liable under Monell, under 1983, for that negligence claim against those perpetrators.

THE COURT: Because the chief of police was

involved?

MS. BAIN: Because the chief of police knew, because the assistant chief of police knew, because they in effect approved it. There was evidence submitted, and the testimony of Ann Hebert, who's the IAD officer, that indicated that there was a statement by Craig Farrell, who was Chief Nuchia's personal attorney basically at the-time, that they didn't want to sustain the complaint because they didn't want to have to discipline these people, because they would have to fire them, they couldn't transfer them. And that's in Ann Hebert's deposition testimony.

If that is true, then the chief of police adopted the policy or practice of failing to address this conduct and approved it as a practice of the City under the standards of Monell, and the City becomes liable for that conduct. They don't have immunity from it. That's the basis, Your Honor.

THE COURT: So it is a practice and policy argument, I get it?

MS. BAIN: Yes, Your Honor.

THE COURT: Because otherwise it would be clearly barred by --

MS. BAIN: I understand. It's a policy and practice argument.

THE COURT: I see.

MS. BAIN: That's our contention. There's a fact issue

on that.

THE COURT: So you're not asserting this against the individual defendants at all?

MS. BAIN: No, Your Honor, that is a claim solely against the City.

THE COURT: Okay. And the plaintiffs, what do you say about this workers comp bar? In other words, there's an argument suggested here that under Section 101.021 of the Texas Workers Compensation Act, that this claim is barred because of -- that's under the Horton versus Montgomery Ward.

MS. BAIN: That is in the original summary judgment motions and responses. It's not really addressed by Judge Botley at all. But if I can summarize -- and I'm going to apologize because I'm not going to know all the cases off the top of my head. But the law in Texas is for it to be a workers comp claim based upon a mental injury, the mental injury has to be traceable to a specific identifiable event.

Injuries that accumulate over a period of time because of conditions in the work place that are mental injuries are not under the act and there are state cases, Texas Supreme Court cases that say that. There is no bar. And as a practical matter, mental injuries most of the time are not workers comp injuries for that reason, unless it's something like, I saw my co-worker killed or I saw -- and there's a sudden traumatic event that inflicts the mental injury. But mental injuries that are caused by a continuum have been held by the Texas Supreme Court to not come within the Texas Workers Comp Act and therefore there is no bar. If Your Honor would like, I can --

THE COURT: I actually -- we dug out, we're reading the underlying briefing. So frankly, I and my law clerk, we could not get to this, but -- given everything else we're doing. But I'm a little --

MS. BAIN: It may be in the first response to summary judgment, because in the second summary judgment they really didn't address that to the same extent, and I tried not to repeat everything that had been previously briefed. But let me see if I can find it for you really quickly in the pleadings.

THE COURT: But if I understand you correctly, this all is actionable, your theory, that is, is that it's actionable because this tort is imported into 1983 as against the City for a practice and policy.

MS. BAIN: Which tort are you --

THE COURT: Negligent hiring. I'm still worried --or not hiring again, retention or supervision.

MS. BAIN: Yes, it's against the City.

THE COURT: I mean, but you're not arguing that there was a negligent retention claim per se against the City. You're arguing.that it's a 1983 claim with the substantive violation or right being the right to be free from negligent retention of your boss, who is a bad guy? Or are you arguing that the City somehow is liable directly for negligent retention?

MS. BAIN: I think we argued it in the alternative under the Texas Tort Claims Act, although Tort Claim Act

would put a limit on the recovery, whereas 1983 would not. Because it's our contention that the way this all came about, that the Tort Claim Act provisions are implicated to the extent we have a negligence claim against the City.

THE COURT: Did you exhaust --

MS. BAIN: The notice went to the defendant immediately through the IAD charges, and therefore there was no subsequent notice required under the case law. They had notice of the complaint. They knew what it was. So there wasn't any need to do a second notice.

THE COURT: Let's hold the issue. The Texas Tort Claims Act, that one never entered my screen, but that -- is that a claim against the City?

MS. BAIN: City only.

THE COURT: City only. Not the individuals. And it's to that -- to that claim that the bar would be applicable, if it is?

MS. BAIN: Yeah. If you have a negligence claim against the City under the Tort Claims Act, there are caps on damages.

THE COURT: Right, right. But that's different from what I'm asking.

MS. BAIN: I'm sorry.

THE COURT: I think I inadvertently stumbled into

something that may be confusing to you. Number one, I'm interested in this comp bar, workers comp bar. But I'm now confused as to -- from the City's point of view, what does that bar? Help me with that. Does the City contend it bars a particular claim, and if so, what?

MR. BEGLE: Well, Your Honor, I think I may be getting confused a little bit about where we're going. Basically, we feel that the Texas Tort Claim Act bars these tort claims against the City because there is no use of, operation of a motor vehicle or that stuff.

THE COURT: Hold off on all that. I understand that and that's a separate discussion. But -- partly from some notes I'm working from. But I have understood that there is an argument that the workers comp statute barred some claim. Which claims?

MR. BEGLE: There was a claim, the claim of Pam Grant, which was found to be compensable under the workers comp, the signaling event that they found was an event where partitions were taken down from around an office place or something like that. I think workers comp found that. compensable based upon that was the triggering incident, so it was compensable, therefore that should bar recovery because of workers comp. That was the argument.

THE COURT: Only as to Grant, not as to Bain?

MR. BEGLE: As I recall, that was the only workers comp.

THE COURT: Okay. Since I've held that Grant is

still in this case, but I have not -- I'm not prepared to really address that today. I'll just carry that one with the case, because I know Ms. Bain, none of us have time to get into this level of detail, but I did see this comp bar in the case and was just unclear partly because of lack of time, where it fit in.

MS. BAIN: Your Honor, I will be happy, you know, later when we reconvene for trial or between now and then, if you want it, in a very short letter or summary form tocapsulize those cases on the mental injury differential.

THE COURT: Yes.

MS. BAIN: And response that we filed really addressed more the issue of one, Ms. Grant never filed a workers comp claim. It was the City that treated it as a comp claim. And there is no record of any comp filing by Ms. Grant. So there is no known waiver and there's a case right on point on that. But also based upon the fact that even if you -- even if you take that first, injury in 1991, she was released to return to work after that injury. It's the things that they did after that that totally debilitated her. And so I don't know that it's really necessary to address that.

THE COURT: Okay. Well, the 1991 injuries, in my opinion, would be time barred. I know we can fight it out continuing injury and all that, continuing violation, but from my perspective, continuing violation gets us a cause of action, but it doesn't get you damages and damages will only be actionable or recoverable for wrongs up to two years before the case was brought. In her case, it's some date, whenever it is, but it's not 1991, I don't think. It may be late '91 if she gets relation back under the time of the filing of the

complaint.

MS. BAIN: I don't want to start a new topic, but I don't think the rules for tort claims under the Texas continuing tort is the same as under the discrimination law, which is what I think Your Honor is focusing on. And I think basically there is no limit on damages under the Texas continuing tort theory.

THE COURT: Well, okay, but you're arguing that she got better from the action that caused the comp payment, and these are new wrongs in any event.

MS. BAIN: Yeah, I'm saying that she was released to return to work. That doesn't mean she didn't suffer from the first incidents. I mean, that doesn't mean that she didn't suffer emotionally and have damages from that. What I'm saying is, though, that for them to take these purposes, that for workers comp purposes, that they're wanting to rely on the workers comp bar, it's really irrelevant.

THE COURT: Okay. I understand where you're coming from. I'm not prepared to discuss that today. So that one is just going to have to carry.

Let's get back to the more major issue that I think is still unresolved in my mind, and that is whether you can have, under 1983, a cause of action for violation of a state created right.

What's the defendants' position on that? Or does it have to be a right created under federal law?

MR. BEGLE: That's our position, Your Honor, the federal law and federal constitution. I believe there was some case law cited in our response. It's Maine versus Thiboutot, 100 Supreme Court, 2502.

THE COURT: That's my understanding of the law, too. And that's why I was hesitant about this First Amendment argument, but I'm interested in your response, Ms. Bain, on this Maine case or the concept that you could import through 1983.

MS. BAIN: I think it's going to, in some respects, be relative to Your Honor's prior ruling, which I'm probably going to try to address at a. later point at trial. But the law is that liberty and property interests are created by contracts, by state law, by understandings or agreements between the parties, et cetera. And so, if you have a state law created right, it may form the basis of a federally recognized constitutionally protected right. And the case that I know on point is Phillips versus Vandygriff, which is a Fifth Circuit case. That's an older case. I'm trying to think off the top of my head.

THE COURT: I'm going to tell you, that would be one of the other things that you need to do, and we' 11 set a little bit of briefing schedule. I'm concerned about that.

MS. BAIN: Okay.

THE COURT: You're going to have cases to take -- claims to take to trial for most of your clients. But this one bothers me.

MS. BAIN: I understand.

THE COURT: Now, with respect to my ruling on this, then, to the extent that I now understand you under 1983 to be arguing that there's a pattern and practice of violating your client's rights to be free from negligent supervision or retention, I've got to think about what's here, and that's what you need to brief, because the negligent supervision and retention doesn't in and of itself state a cause of action. That's barred, as you know. But I'm not clear that a state created right can form the basis of a 1983 claim, and I know you don't agree with that. I'm not comfortable making that ruling here and now.

With respect to civil conspiracy.

MS. BAIN: Your Honor, before you go into that, our conspiracy claim is not necessarily a civil conspiracy claim under tort law. I think Magistrate Botley addressed it that way, but we had pled for civil conspiracy under Section 1985, which was really the intent of our pleading.

THE COURT: Okay. Then I'd like to address that. You never intended the state civil conspiracy tort?

MS. BAIN: I don't think it's really applicable. And I think the conspiracy in our pleading was pled in conjunction with 42 USC, Section 1985, which is conspiracy to deprive someone of a civil right. And that's what was intended. And I apologize if the Court has spent a lot of time on it, because that's not really what was intended. That's why we did not object to that portion of the magistrate's ruling.

THE COURT: Okay. Good, then I understand that. Because that one was giving me problems.

With respect to the federal. We're in that same area of whether someone can conspire with themselves or whether these individuals acted outside the scope of their responsibilities to the detriment of the City or at least for their own personal gain, so as to take them out of the standard rule that you cannot conspire with yourself.

Now, I know the magistrate has dealt with that from the state claim standpoint. I did recognize that you were arguing a federal claim. I thought you might also be arguing state. But under 1985, Subsection 3, the Plaintiff must allege the involvement of two or more people for the purpose of depriving directly or indirectly a person of equal protection, or an act in furtherance of conspiracy which causes injury, or a deprivation of a right. That's how the test at least is set out in Hilliard versus Ferguson, 30 F.3d 649 and 652-53 (5th Circuit 1984).

Now, I read that to mean that the Plaintiff must show this is a conspiracy motivated by class-based animus. Do you disagree?

MS. BAIN: I do. I don't think it has to be class based in terms of if you're talking about racial or sex or -- you know. I think we include that, but I think it can also be under the section which deals with or otherwise deprived of rights, for example, the First Amendment right, the conspiracy to bribe. I suppose theoretically, I mean, you still have a class, it's just a different type of class, i.e., the officers in the department. But it's not your traditional classes. I don't know

if that's what Your Honor is referencing.

THE COURT: Well, I'm reading some notes, but my understanding is that this has been virtually quoted and the reference to equal protection, which definitely has a class-based traditional ring to it. I'd like you to -- I'll give you one last chance to sort of summon your conspiracy theory here. But you're relying a lot on Holloway v. Skinner, which I think in my mind may have brought in the state thinking to the magistrate maybe.

But the only case that I found that seems to be pertinent is Thomas versus City of New Orleans, 687 F.2d 80 -- F.2d, Page 80, (5th Circuit 1982), which concerned the code of silence in the City of New Orleans Police Department. There are some analogies between that case and this. There are some other cases at the district court level that are not in this district. I don't know if they are really very germane, but --

I don't understand -- I'm having a problem with separating these individuals from the City. And it's the same problem that I have with respect to this state cause of action involving tortious interference. At least under the state cause of action of tortious interference, which I gather you're trying to import through 1983 as well. There, that Holloway case sort of sets it up, so at least if you have an agent, then, you know, you've got a standard to apply. I have not found anything except this one Thomas case, in which this conspiracy concept was alleged. But it was recognized there in Thomas. So that's -- I'd like you to brief little bit more on that.

I am concerned because these causes of action, which I've pressed serious doubt about, namely negligent hiring, tortious interference and conspiracy, all rely on these individuals being separated out from the City. And yet you are trying hold the City liable. In other words, their actions have to personally benefit them, but yet they've got also, as I understand your argument under 1983, they've got to be imported through that lens, meaning you need to find a pattern of practice of the City.

And -- so there are still hurdles here. I don't chink the magistrate dealt with these issues at all. I don't think he fully communicated to me through his memorandum what the intricacies of his thinking were or your arguments are.

I do think that a trial is necessary on the sex discrimination claim, and it's a retaliation case, as I read it. I think that's what this case is. I think that's what this case will always be, and unless there is a cause of action that under 1983 for pattern and practice, based on the violation of the state right in which people are conspiring with themselves, the state causes of action may wind up dropping out. I'm not doing that now because I think it deserves more attention from me.

On the other hand, the defendants need to know, A, there is going to be a trial and we're going to set a date; B, I think these allegations are serious. I've already been through one trial with the City on serious police allegations. It was a hard trial, we all found it difficult. I thought it needed to be tried.

I want the City to look very closely at this case before

you take it to trial. I need to tell plaintiffs that the City did to go trial and the plaintiff, in the Williamson case is what I'm referring to, got $100,000, and that was it, as I recall. I could be wrong.

MS. BAIN: She had no loss wages, though.

THE COURT: She did not. That's true, but she was a very effective witness and a very sympathetic plaintiff.

I want to emphasize, I sat in this trial and I heard her and the jury heard her, and they gave her $100,000. She did not have lost wage and I don't know what your lost wage claims are, nor should I at this point. But I believe it's your three clients sitting in the back of the room; is that true?

MS. BAIN: Two of them, yes.

THE COURT: Okay. In any event, I am going to urge that some serious negotiations go on. We partly went through all of this analysis because I needed the education from you. I wanted you to have my thoughts. I am not signing an order adopting the MNR. But it's too complicated for me to write again on it, and I didn't feel prepared to write on it, based on the issues I saw. So I would like to simply give the following bottom line rulings as to what I think survives and what needs to be tried until further briefing. I'm modifying this MNR to the extent noted in this transcript, that there would be not be a detailed written decision.

On the Texas Commission on Human Rights Act, I am allowing that claim to go to trial. I think, in that respect, I think that Judge Botley intended to deny summary judgment on that to the extent it was even moved for. Defamation,

premises liability and privacy rights, Magistrate Judge Botley granted the defendants' motion, and I do, too. That's adopted.

Section 1983, claim for sex discrimination per se, deprivation of liberty and property. The magistrate judge denied it as to sex discrimination, I think, and did not address the latter two. I am granting on all three.

Deprivation of liberty and property under the Texas Constitution, I don't think Judge Botley dealt with that, but I am granting that.

MS. BAIN: I don't think we had a Texas Constitution claim for those, Your Honor.

THE COURT: Yeah, I'm hesitant because I know I haven't directly addressed it. Let's say it's withdrawn, it was never alleged.

MS. BAIN: I don't think it was. I think only the First Amendment -- free speech under the Texas Constitution was alleged.

THE COURT: Okay. So then I'm not having to rule.

Tortious interference with contract, which I now understand to be a Section 1983 practice and policy claim. Motion was denied as to that. I am denying at this time, but without prejudice to further briefing. And I'm denying on the basis of my reasoning, not his. That is, I'm denying the summary judgment.His claim is still alive until we get further briefing.

Statute of limitations on Grant's tort claim, I'm denying for the reasons stated, as did the magistrate judge.

Free speech under 1983. And the federal free speech right, First Amendment is -- the magistrate judge granted, I am denying under the Federal Constitution.

To the extent than 1983 is sought to import the State Constitution and First Amendment right, I'm denying -- again reserving the right to revisit it at a later point.

The negligent hiring and supervision and retention. Frankly, I'm going to strike from everything I have the word "hiring." But it's negligent supervision and retention, as I understand imported into the federal policy and practice under Monell against the City under 1983. Magistrate judge granted. I am denying on the same ground as these others state causes of action being imported, namely without prejudice to future briefing and motions.

Civil conspiracy, Section 1985. I believe Subsection 3. Magistrate judge granted. I'm denying that, again reserving the right to be revisited, but it is denied for this time.

As to the state-based civil conspiracy cause of action, I understand it was not alleged, and so I'm not addressing it.

Intentional infliction of -- I forgot to deal with. The bottom line on that is that I am denying the intentional infliction of emotional distress without prejudice to future review, as to Benningfield and Grant. But I am granting it, as Magistrate Judge Botley did, as to Frankhouser.

It is with again some hesitancy that I keep this claim in this case. However, I am very familiar with the Wilson versus Monarch Paper case, and frankly, I feel quite familiar with later cases which went the other way.

It is my assessment that the reason that the Wilson case survived summary judgment or was affirmed on appeal after trial is because he was fundamentally humiliated -- the treatment of him by his employer was downright mean and it was outside the ordinary conduct of an employer with an employee, in terms of grievous demotions and insults and change of location of work and giving him custodial work, as opposed to executive responsibility he had previously done.

And there are other things done outside the ordinary rubric of ordinary employee/employer conduct. I think that case is out there, but I think that the Fifth Circuit does a lot -- does tolerate a lot of insulting and negative treatment by employers of employees that does not rise to the level of intentional infliction, regardless of what we all individually might think about the courtesies or fairness or the appropriateness of the behavior.

Fifth Circuit tends to not allow these cases under doctrines articulated in such cases as the McArthur case. Having said that, however, there is conduct by these supervisors and even the senior management at that time, Bradford and Nuchia, that is not understandable. And a fact question is created as to why the IAD process was manipulated in ways that it was, or the Runnels and others prevented Benningfield from attending conferences that others thought she needed to be at and her duties would require her to be at.

The demotion of her, that is taking away of her title late in the game, but keeping all the responsibilities the same, a revealing of her psychological tests or records or requiring her to go for psychiatric tests being announced in front of others, the refusing to allow Hebert to finish the IAD procedure the way it was supposed to have been, and requiring night duty or paying overtime to others, is very problematic to me.

So bottom line is that I am going to deny the summary judgment motion as to Benningfield and Grant. I haven't given detailed explanations as to Grant, but it is similar. It is with-again great hesitancy that I do that I feel like I need to understand this record in order to know whether -- understand the record better in order to understand whether this case is in or outside of the McArthur line of cases.

So it will be inappropriate for me to dismiss this on summary judgment. I think there's a genuine fact question that needs to be resolved before I can make a legal determination, and it's McArthur versus University of Texas Health Center, 45 F.3rd, 890 and 898, and Danawala versus Houston Lighting & Power, 14 F.3d 251, 556 (5th Circuit 1993) . And Twyman, of course, versus Twyman, 855 S.W. 2d 619, 621, (Texas 1993).

And finally Hirras, H-i-r-r-a-s, versus National Railroad Passenger Corp., 95 F.3d 396, F400 (5th Circuit 1996).

The Burden versus General Dynamics case also gives me cause and causes me to deny this motion. 60 F.3d 213, (5th Circuit 1995). That one was granting of summary

judgment to an employer despite how the employee was ostracized and whatnot.

Anyway, I'm just not comfortable at this point. The record is too complicated, but I don't -- and your clients are here. I do not want the plaintiffs to think that they have hit a home run and done -- and gotten there, in terms of their negotiations, because that's again a state claim being asserted against these -- the City, I think under 1983; is that right?

MS. BAIN: Those claims are also asserted against the individual defendants. I didn't interrupt Your Honor earlier, but depending on the court it is asserted against, the state law ruling of immunity is a little bit different than federal law. And under cases such as Kelly versus Galveston, I think they are liable for their own individual intentional tort under state law. The individual, not the City.

THE COURT: If not immune.

MS. BAIN: If not immune, that's right. Which again I guess there is so many fact issues in this case, it's hard to focus on a specific thing. But I think the individual defendants can be subject to tort claims in their individual capacities under law if the immunity defense fails.

Now, the City is a different story and that's a different standard.

THE COURT: Okay. Well, .the intentional infliction claim as to the City is surviving, but again with that caveat that it's a state claim trying to be imported through 1988 --- 1983, and so I have serious questions. But it survives.

Now, the Texas civil service law.

MS. BAIN: May I explain that?

THE COURT: Yeah.

MS. BAIN: Texas civil service law is a law that requires promotional procedures in the City of Houston Police Department to be followed according to a very specific. standard. It's our contention that the promotional process is ministerial, not governmental, because the law says a vacancy occurs, you give a test within so many days, this is how you structure the test. The number one person on the test gets the promotion; and unless there's a specific reason to pass over, and if you pass over, you better document it and, it is specific, there is no discretion.

THE COURT: No discretion as to timing, et cetera.

MS. BAIN: Timing or as to whether or not to promote, except for possibly -- I mean, if you're going to pass over, you have to follow certain procedures. It is also the contents of the exam to some extent are prescribed, it has to be on issues related to the performance of law enforcement and the job. There are specific procedures that are set up. There has to be 90 days notice of what source materials are used. I mean, there is very specific rules. There is no discretion.

In this case, part of the claims of Ms. Grant and Ms. Benningfield are related to the fact that there were vacancies, within the identification division, that the City did not test for in violation of civil service law There's a letter that was

submitted by Ms. Benningfield asking that the test be given. I don't want to go into all the detail.

THE COURT: What about a statute of limitations problem on that? I don't know what it would be, because those tests, the issues about that test were that she should have had it before this other guy became qualified to take it, based on seniority, I think. At least as to one of them.

MS. BAIN: As to one of them. I don't think limitations have been raised on that issue. I think we would have to sit down and address that, if that's what's going to be raised. Because I think that again is a state law requirement and I think you're going to be, under that particular provision, under a four-year statute of limitations. But I don't want to go into that right now because we haven't -- it hadn't been raised. But the bottom line is that portion of the complaint, it's our contention, are not governmental functions, they are not discretionary functions. And that the system was manipulated.

It is a right that they were deprived of also, but the point is that Ms. Grant and Ms. Benningfield have claims for lost promotional pay arising out of that statute. If the test had been given appropriately, they would have been promoted long before they were. And we have evidence to support the fact that they were qualified based upon their subsequent promotions when the tests were finally given. But there's a loss in pay and there is also other losses because you're not qualified to sit for the next exam until you've served in rank for two years. So that's the substance of what that is asserted for. I think it's related to the discrimination claim, it's not an independent cause of action. It deals with the pay claim.

THE COURT: But it's a measurement, isn't it, really, a measurement of damages as opposed to -- it's a fact question arguably, and it relies on a legal determination, I guess, that they should have given a test at some point. So then you're allowed to make your argument as to when it should have been given and what pay would flow from it. I see it as evidentiary is my point.

MS. BAIN: I tend to agree with you at that point.

THE COURT: Okay. Because the magistrate judge didn't deal with that.

MS. BAIN: He didn't deal with it and I don't think it was ever raised in the summary judgment. That's probably why he didn't deal with it. It's more an issue of --

THE COURT: Do you agree?

MS. BAIN: Whether that law was violated.

MR. BEGLE: I believe I touched on it in the Motion for Summary Judgment, at least as far as it refers to the individual defendants.

THE COURT: All right.

MR. BEGLE: As far as it refers to the City, I just didn't see the issue as far as damages. Generally, what is done, if the test isn't given timely, the person that receives the position is given retroactive -- seniority retroactive pay.

THE COURT: Okay.

MR. BEGLE: What I was --

THE COURT: Wait. Stop for a second. Are you asserting this against the individuals?

MS. BAIN: No.

THE COURT: Okay So your motion is mooted, really, it's academic. And I don't need to rule since there is no claim against the individuals and you only moved on their behalf. Okay.

Then the Texas civil service law is not a separate cause of action, and in terms of whether it's allowed to be used for a damage measurement to me, which would be a matter of evidentiary ruling later. So I'm not going to deal with that now.

MS. KRAFT: Could I interrupt the Court for one moment? I have two children who are three and a half and five, who are at the day care center currently waiting to be picked up at 6:00.

THE COURT: You're excused.

MS. KRAFT: Thank you.

THE COURT: I'm taking the time to do this hearing this way because it would take me forever to write this. I just do not see the point of spending that kind of time on it.

Now, having said all this, the final issue is these causes of action against the individuals, the intentional

conduct that you're claiming.

What do you understand the magistrate judge to have done with that?

MS. BAIN: I think that the magistrate judge denied as to the tortious interference claims. I think he granted as to the intentional infliction of emotional distress claim.

I think those are really the only two tort claims.

THE COURT: Let me just go back to it.

MS. BAIN: Am I forgetting one?

THE COURT: I'm not sure.

MS. BAIN: I don't think I am. Well, the defamation and the invasion of privacy claims, which again we really didn't object to the magistrate's ruling on those two points. I don't know that I necessarily agree with everything that he did, but I think there are other claims that fit the facts better.

THE COURT: On Pages 10 --

MS. BAIN: Of the magistrate's ruling?

THE COURT: Right, through -- 10 on. I think he held that the defendants are entitled to immunity on the invasion of privacy, freedom of speech individually, but not sex discrimination. But I'm just not sure where else he ruled on it.

MR. BEGLE: What I saw was tortious interference

with business relations and sexual harassment or sexual discrimination, just those two issues.

MS. BAIN: Also, on -- really, if you go down to Page 17, that's where he starts the state law.

THE COURT: Right, 16, 17. In 16 he says, in a Heading C, state immunity from plaintiffs' tout claims, which I thought meant he was talking about --

MS. BAIN: He did alternatively the individuals and then the City. So you kind of have to --

THE COURT: Yeah, you're right, okay.

MS. BAIN: He granted summary judgment on invasion of privacy, he denied it on tortious interference. That's on Page 19.

He granted it on intentional infliction. Premises liability was not addressed against the individual defendants under law. It wouldn't be applicable, nor was negligent supervision or retention. That's a claim against the employer, not the individuals.

Intentional infliction of emotional distress was asserted against the individuals and he granted the summary judgment on that.

THE COURT: On the intentional infliction?

MS. BAIN: Yes, Your Honor. And the premises liability, again, that's not an individual defendant claim. That

would not be applicable to individuals. And he granted it on defamation.

THE COURT: Okay.

MS. BAIN: For the Court, civil conspiracy is the other one, but again, that wasn't really what was intended by that pleading.

THE COURT: Yeah, but you are alleging civil conspiracy against them individually under 1985?

MS. BAIN: Yes, Your Honor, 1985, but not under tort
law.

THE COURT: Right, okay. Mr. Begle, do you have any
different interpretation of the magistrate's decision?

MR. BEGLE: No, I agree.

THE COURT: So it's sex discrimination, but I've dismissed them on that one. Tortious interference, intentional infliction and civil conspiracy still are surviving as against them individually.

MS. BAIN: The magistrate granted summary judgment on intentional infliction. I assume you're going to have the same ruling, but --

THE COURT: Well, I'm a little uncomfortable about doing that at this point because of what I've said. I don't think

that the cause of action against them individually -- I'm just not sure. I think that that one, there's a reasonableness threshold that I think there's a fact question about. That's my problem.

MR. BEGLE: If you can bring it under Section 1983.

THE COURT: No, no, but -- yes, well, yeah, they're trying to bring it -- she's trying to bring it, I think, under 1983 against these individuals, or are you trying to bring it directly as well?

MS. BAIN: Directly as well, under Kelly versus Galveston County and on the issue of whether or not they have immunity under the state standard.

THE COURT: Because it's an intentional tort.

MS. BAIN: Yes, Your Honor.

THE COURT: So I have not really addressed that, in other words, and I'm not convinced that the magistrate's ruling did, either. I didn't read it that way.

I'm going to not dismiss these intentional torts of tortious interference, intentional infliction and Section 1985 conspiracy as against these individuals at this time.

The first two, you've heard me on. But I'm concerned. I cannot -- some of the conduct just did not seem reasonable as to the way they handled the IAD proceedings and things like that. So I'm very bothered by all of that. And the defendants' explanation didn't do anything except cause me to have a fact question.

You made your motion, but then the plaintiffs' response created the fact question and the defendants' reply didn't solve it for me under a reasonableness standard, given how that the IAD processes were being, what I call manipulated or gotten around, I mean, when one of the Bradford, I guess it was, who's out there doing what the plaintiffs call informal investigation. So I'm not prepared to hold on this summary judgment phase that they are not -- that the claim is not actionable.

So at this point they are still in this case, the big boys.

I think that this case needs to be set for trial. I'm going to give you a setting far in advance, which barring a criminal case, you will have as a first setting.

I want to set you in July or August.

MS. BAIN: Your Honor, I have a case that's preferentially set in August in Judge Rosenthal's court, it's now before the magistrate. I think we'll go, because she gave us first on her docket. It's a two-week trial.

THE COURT: In August?

MS. BAIN: I think it's the first Monday in August. Let me look at my calendar.

I'm pretty sure it's the first Monday in August.

THE COURT: That's the 4th.

MS. BAIN: That sounds right. Hold on and I'll tell

you. It's August 4th.

THE COURT: I had been looking at July 14th. How long is this case going to take to try?

MS. BAIN: I don't know how it can be done in less than three weeks.

THE COURT: Three?

MS. BAIN: I don't think it's -- I mean, I'm going to try hard, because I know how Your Honor doesn't like wasted time. But I've got three plaintiffs that have separate facts.

There is some overlap. But, I mean, to get to that point, that's cutting a lot. I'm trying really hard to condense it to the really important things. But I don't think we could even represent to you any less than that. It would be a lack of good faith.

THE COURT: You agree.

MR. BEGLE: If the allegations remain as they are, I think at least three weeks, if the causes of action remain as they are.

MS. BAIN: I would say that with the expectation that it might go over.

THE COURT: Well, then I don't think I can get it done in July prior to your other setting.

Well, you think that that applies-regardless of the 1983

question I've identified?

MR. BEGLE: I think even with just the sex discrimination and the First Amendment claims and the retaliation claims.

THE COURT: It's the same length.

MS. BAIN: It's the same length. I have to prove three cases. I mean, I have to have an expert as to each of their damages. They each have separate doctors who are going to testify. I don't think it's realistic to expect it to be any less. I'm sorry, your Honor, but I just don't think it is.

THE COURT: Okay. That's encouraging.

September. Let's look at September. How about the 8th of September?

MS. BAIN: Open for me.

THE COURT: I'll put you down for -- I'll give you three weeks. Sometimes in these long trials -- I'm now in a six or seven week trial and we are not sitting on Fridays, because frankly, the lawyers are exhausted, they need time and in a longer trial they need time to do other things, as do I. So I'm not sure whether it will be three weeks, four-and-a-half day weeks or five-day weeks or four-day weeks. It will not be five days. I misspoke.

MS. BAIN: With that, Your Honor --

THE COURT: I mean, and I understand that it might

push you over into a fourth week. Some of that is going to have to do with whatever criminal cases I have beating down my door. And I won't know that until the time gets a lot closer.

I think what I need to do is get the briefing from you on 1983. And I'd like the plaintiff to submit something within the next, let's say, two weeks.

MS. BAIN: When you say on 1983, you' re talking specifically about the issue involving the City's liability on the tort claims?

THE COURT: Right.

MS. BAIN: Okay.

THE COURT: And if you have anything else you want to submit to me on the negligent -- I mean, the tortious interference or intentional infliction causes of action, especially against these individuals, you can submit it, because I'm going to allow the defendants to put in some briefing very focused on those causes of action. It's sort of another summary judgment-round, but I just found the other round, you had so many causes of action and it was so dense.

We will use your prior -- both sides' prior exhibits. In other words, do not feel like you have to resubmit exhibits and more paper on that. I just want briefing with citations to your prior exhibits.

I'm very uncomfortable with these causes of action, so I want to be sure that I want them to be tried. And I think that

they are legally viable. It's a waste of everybody's time, particularly these individuals as well. I want to be sure that they are viable causes of action, and I want the briefing fresh, now that you've had a chance to sort of step back. And if there is any briefing on the conspiracy, you can give me that, too, especially with respect to the individual liability. It really has to be individual liability. The City can't conspire. Arguably, it could be one of the co-conspirators.

All right. So if you need a little more than two weeks, it's fine. You're not going to trial for a while. You all can work out a briefing schedule, if you want. But I don't want it to be so far down the road that I forget what I've learned about this case. I also am going to require a mediation in this case.

MS. BAIN: Can I address that, Your Honor? We've been to mediation, at great expense, I might add. Judge Botley ordered us to mediate before Judge DeAnda, which we did not oppose, because I Think he's an excellent mediator. We went to mediation, we spent two days because we knew the facts were so detailed and it did, in fact, take all of the first day just to educate Judge DeAnda on the facts.

And Judge DeAnda, as I -- was very frustrated. The defendants never made an offer, they left the mediation in the middle of the second day informing Judge DeAnda that they were going back to get more authority, at least this is what was reported to us, because the authority that they had, they thought would insult plaintiffs and make things worse.

And the idea was that Judge DeAnda was going to go meet personally with the city attorney and talk to him about

his impressions. And that meeting never occurred because then the defendants changed their position and kept attempting to get to us to rebid our offers, which we eventually said, "Look, you've not made one offer."

We actually even filed a motion to recover the costs of the mediation because I truly believe the mediation was engaged in solely to feel out the plaintiffs' evidence and in bad faith, because to date we have never made an offer.

THE COURT: Received an offer.

MS. BAIN: Received an offer, excuse me. We made an offer in writing before we went to mediation, they knew the numbers we were talking about. At mediation, we made the first offer and came off of that written offer and they were made -- you know, there is no question that they knew where we were coming from when we went there.

THE COURT: What are your hard damages?

MS. BAIN: Ms. Grant's hard damages are extremely high because of losing her license with TCLEOSE. She is unable to obtain any alternative law enforcement employment.

And there's an issue -- I'm talking from the top of my head, but --

THE COURT: Just give me --

MS. BAIN: Including her retirement, I think they are in the range of $700,000. I mean, they are high. Ms. Frankhouser has high loss wages as well. We're alleging constructive discharge in her case.

She took a significant cut in pay and lost significant retirement benefits to go to Montgomery County. Obviously, they are not as high as Ms. Grant. I cannot recall those off the top of my head. I apologize.

Ms. Benningfield's loss of pay deals with at least two years of loss promotion pay because the test was not given for a period of two years. And when she did finally take the test, she placed first on both tests. And I think, if I recall correctly, that hers is in the $150,000 range. And that's off the top of my head, on lost pay damages. And part of the reason that the pay is high is the retirement that's available to the classified officers. They have a very specialized retirement package and also, the City recently adopted a program which is called Drop Program where you don't have to retire, but you continue working.

THE COURT: They have all retired?

MS. BAIN: Ms. Benningfield is still working there.

THE COURT: Okay.

MS. BAIN: Hers is limited to a pay differential. The other two actually have a loss.

THE COURT: But Grant has the statute of limitations problem potentially, I mean, Botley thought that they were severe.

MS. BAIN: No, he denied it.

THE COURT: Well, he denied it on the ground that he thought it was not appropriate.

MS. BAIN: I understand. But I think he focused on the last act, and I think there are others within the time period as well that will serve as a basis on those.

THE COURT: I mean, I've tried to cite to a few anyway, one way or another.

MS. BAIN: I understand where you're coming from, Your Honor. Yes, that was raised in her case, yes. But the lost pay is not a problem there because the lost pay begins well within that two-year period. She lost her license.

THE COURT: Oh, I see. Yeah, yeah. You're saying the number you've given me or that range is from the time she lost her license onward?

MS. BAIN: Yes.

THE COURT: As opposed to anything prior?

MS. BAIN: Yes.

THE COURT: I get it.
What do you have to say, Mr. Begle?

MR. BEGLE: As Ms. Bain stated, we were at the mediation. We did have a -- set an offer that was authorized for us to make at that time that --

THE COURT: I don't want to know the details of the mediation, but I just want to know what you think about a future one.

Let me make this proposal to you, because I don't want -- I'm concerned about you being put on the spot.

MR. BEGLE: Thank you.

THE COURT: You' re welcome.

I would like you all -- you have probably the hardest job going right now because right now these individuals who are, you know, high profile people in the City of Houston are being -- have these claims asserted against them. I'm telling you in good faith, I don't think I can come out differently than I have, although I'm going to relook at it with fresh briefing. Because I do think that the case is extremely complicated. It's problematic for the plaintiffs in that regard, let alone for the defendants. This case needs to be thinned out.

MS. BAIN: I understand, Your Honor, you're right.

THE COURT: And so, having said that, I've done what I can to thin it out and to get it back on track from the perspective where I think the issues really lie.

I'm eager for there to be some negotiations. I've spent two hours almost with you all, probably boring you silly, but I've done this because I can communicate with you better and to your clients better the concerns that I have. I'm the trial judge, and it's very important and I think both of you have been to trial in my court. I like going to trial. I have no problem doing that. I work real hard in trials and my lawyers that are here work real hard. You' re entitled to a trial.

But this is a case that the Plaintiff should be

discounting and the defendant should be focusing on as a risk, a serious risk. And I urge you to put aside some of the prior thinking and look at it going forward, okay? I think that plaintiffs have to look at this case and discount it, because there may be good case here, but there still may not be a claim. The Court of Appeals, even if I were to allow a case -- a claim to survive, the Court of Appeals is much rougher than I am.

MS. BAIN: I understand.

THE COURT: And the defendants know that.

All right. Now you've been through summary judgment and it's not being granted on a whole bunch of things. You're in a different position today, City, and individuals than you were yesterday. Maybe a little different anyway. I urge you to rethink this. If you want to have another mediation, I would urge that it happen. But I think it does have to be at the City's expense.

I'd like you to think about that and see if DeAnda is the person to use again or not. I'm not saying he is, but there may be some benefit to the knowledge he already has. If he is used again, I will talk to him and I will tell him what I've told you. I would suggest you get this record. But in any event, I will tell him things about where I think some meetings need to go on.

DeAnda has the advantage for the City of being a prominent experienced judge, former judge, who's also a male
of the same vintage or older than your clients. And I think

that's a plus. I really do. I think if he says things, they are going to see if maybe a little differently from the way if I said it, if I wasn't a judge. May see it differently from the way I see it, you know, whatever. So I urge that you consider it, but the defendants would have to pay for the mediation and one day would be more than enough -- not more than enough because there are three plaintiffs, but I think a long day should do it. And DeAnda, I would urge him to give you a discount if he is too expensive. He's got time invested in this. So on that basis I want to require it, but I also want the City to pay. I feel like the City has to have those individuals present.

MS. BAIN: That was another issue.

THE COURT: I'm sure it was. They do need to be present.

MS. BAIN: In fact, it was Judge DeAnda's recommendation that the city attorney be present and Judge Botley also expressed that at one point.

THE COURT: Well, was he?

MS. BAIN: No.

MR. BEGLE: I'm not aware of that, Your Honor.

THE COURT: Okay. I'd like to hear back from you, okay? I am ordering it. If you feel like that needs to be revisited, I want you to give me cogent reasons why, and you may do so in a sealed letter. Okay. Because you may have real good reasons why, and I don't think you have to

communicate those outside of an in-camera submission.

MR. BEGLE: But you order that the city attorney be there?

THE COURT: Yes. Well, either that or someone with real serious access to the mayor and the city council. Gene Locke would be great. But if Gene Locke is not the best person to evaluate this case and make a pitch to the mayor and to the city council, then I would recommend that that person be there. Gene Locke may very well be the person, because he was appointed by the mayor. But I'm not sure. Those kinds of things I want to analyze before you respond. But yes, my order is that he be there, unless you give me good reason why not.

Okay. Thank you, you're excused.

MS. BAIN: Your Honor, can I ask one question, because there is one issue I'd just like a quick answer on. We filed a motion dealing with a deposition.

THE COURT: Oh, I read cases on that.

MS. BAIN: I don't think we can rule because the deponent has an attorney and he's not yet responded. But my question is, I don't know if Your Honor even recalls, that attorney had previously requested an emergency hearing, then he passed it, he showed up at the deposition and said, "Well, that means I'm not answering questions."

And we had agreed to reschedule the deposition so he could get a ruling and then Your Honor sent it back to Judge Botley. I would like to request that we just either set an

emergency hearing -- not an emergency hearing, but a hearing with you by telephone or whatever so that we don't have to go through the procedure of objecting so we can get the deposition done.

THE COURT: Right. I'd like you to try to resolve this. Let me tell you what my research shows thus far. I understand that this attorney needs to respond. But the City really has responded today.

And the issue is that the client is not asking for privileged material. Now, to the extent the client wants to know who said what to whom in a meeting with the City -- is it Jan? Is it a man?

MS. BAIN: Jan is a woman.

THE COURT: Woman.

MS. BAIN: Jan Rich.

THE COURT: Jan Rich needs to answer these questions. Okay. To the extent that the City is concerned about notes, which apparently you haven't seen, I am prepared to read those notes in-camera and make sure that any redactions that are proposed -- I don't know --

MS. BAIN: I'm not proposing the redaction. That was my problem. From reading the notes, I don't --

THE COURT: Are you prepared to make those available to the other side?

MS. BAIN: We were trying to give them to the

deponent. She's the attorney who took the notes because she testified she doesn't have any -- she can't remember specifically, but she has some specific quotes in these notes and things of that nature. And I wanted to give them to her to say, okay, what isn't --

THE COURT: Okay. Here's what I propose, just to get this show on the road. I'm not going to require a waiver of the attorney/client privilege or the work product privilege, as it were. The work product privilege, I might add, is the client's privilege, except as to opinions of the lawyer. I think we all are on the same page on that.

I would propose the notes be given to the attorney, Jan Rich, that she determine what, if any, constitute opinions and what redactions she wants to make. And with her response to your motion, she file the proposed redactions to the notes, that is the notes as redacted and the notes as unredacted. The unredacted in-camera.

Then I can read them to be sure that the City's concern about being deprived of the opposite views or whatever, helpful information, is addressed. And waiver issues can be addressed, if any. It is not my intent to make this lady testify to her impressions, or when I say impressions, I mean her opinions. But it is my intention, to the extent that she wrote things down about what people said and did or agreed to do, and these meetings were with non-clients, that she give that deposition and she give over those notes. To the extent she wrote in there something about what her strategy was for the future or, you know, mental impressions of opinions, legal conclusions, whatever, that's not discloseable. I don't think the plaintiff differs from this. It's a question of executing this

redaction and then the deposition.

Now, she's not here. You can report what we said.

I am going to require a hearing on this --I don't know, when is the 20 days up? It's the end of the month.

MS. BAIN: I think so. Let's see, why don't you make a request? This is a discovery matter. I do these by letter, not motion. I've benefitted from your briefing, but I've done my own independent research, because I wanted Fifth Circuit law, which I've found, and I'm convinced and will cit to you if it becomes relevant. But the point is, I want a letter as to what the response of Jan Rich is to the motion. She can file a response. It needs to be filed within a week from today.

I'd like, you two to give her notice by letter. I will try to put this in my minute order and then you can send her a copy at that. Her response will be in a week. And then if she opposes my proposal, which you'll just have to describe, then she can complain about it in that response and I'll set this thing for hearing.

Her response, I think, it would be best if it were in a form of response to a motion as opposed to a letter. If you all are still dissatisfied, though, then just ask for conference by letter.

MR. BEGLE: Shall I go through her attorney on this?

THE COURT: Yeah.

MR. BEGLE: This is a strange situation.

THE COURT: It's very strange, yes. It's just that I want her to get notice as quickly as possible. If she needs an extra day or two, we're not going to stand on principle on this. Cut her some slack. But my bottom line is that unless they give me a really good reason to change these rulings, I am going to require her to testify and give those notes over. But she does have the power and the right to redact, and I will check the redactions if the City is worried about that.

MS. BAIN: I understand. I just wasn't prepared to redact somebody else's notes.

THE COURT: Okay. That is it for today. Thank you. I'm sorry about the length of this hearing.

MS. BAIN: Thank you go for your time and patience.

CERTIFICATION

I, ED REED, Official Court Reporter for the United States District Court for the Southern District of Texas, Houston Division, do hereby certify that the foregoing pages 1 through 63 are a true and correct transcript of the proceedings had in the above-styled and numbered cause before The Honorable NANCY ATLAS, United States District Judge, on the 11th day of April, 1997.

WITNESS MY OFFICIAL HAND at my office in Houston, Harris County, Texas on this the 16th day of April, A.D., 1997.

/s/_____

Ed Reed, CSR
Official Court Reporter

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed March 4, 1997]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT, Intervenors/Plaintiffs,	)
v.	)CIVIL ACTION NO.
	)H-95-5473
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD I. PFEIL, A. WADE RUNNELS, CO. BRADFORD, ROBERT T. FLEMING AND J. R. JONES Defendants.	)

MEMORANDUM AND RECOMMENDATIONS

Pending before the Court is Defendant's Motion for

Summary Judgment (#29). After a careful review of the pleadings, applicable law, and arguments of counsel during an extensive summary judgment hearing on December 6, 1996, the following recommendations to the Defendant's Motion for Summary judgment (#29) are entered.

I. FACTS AND PROCEDURAL HISTORY

On August 27, 1993, Debbie L. Benningfield ("Benningfield") filed suit in the Judicial District Court against the City of Houston ("City"); the City of Houston Firemen's and Policemen's Civil Service Commission ("Civil Service Commission"); Sam Nuchia ("Nuchia"), Chief of the Houston Police Department; J.R. Jones ("Jones"), Assistant Chief of Police; C.O. Bradford ("Bradford"), Assistant Chief of Police; A.W. Runnels ("Runnels"), Administrator of the Identification Division; R.T. Fleming ("Fleming"), Assistant Administrator of the Identification Division; and R.J. Pfeil ("Pfeil"). Defendants Nuchia, Jones, Bradford, Runnels, Fleming and Pfeil are combined and designated herein as the "Supervisory Defendants". In her petition, Benningfield alleged the City, Civil Service Commission, and the Supervisory Defendants discriminated against her on the basis of sex and engaged in retaliatory conduct in violation of the Texas Commission on Human Rights Act, Tex.Rev.Civ.Ann.Art 5221k (TCHRA). Benningfield also claimed the City and the Supervisory Defendants engaged in conduct in violation of the Texas Civil Service Law, Tex.Loc.Gov't Code Ann.Art. 143.001, et seq. In addition Benningfield claimed that the City and the Supervisory Defendants engaged in conduct which constituted (1) tortious interference with a business relationship; (2) intentional infliction of emotional distress; (3) premise liability or failure

to maintain a reasonably safe work environment; (4) defamation; (5) intentional and negligent invasion of privacy; (6) negligent hiring, retention and supervision; and (7) civil conspiracy. On October 4, 1993, the Defendants answered and plead the defenses of laches, qualified immunity, sovereign immunity, and the statute of limitations.

On April 5, 1994, Peggy Frankhouser ("Frankhouser") and Pamela M. Grant ("Grant") intervened. On December 1, 1995, Plaintiffs amended their petition to include a free speech claim under the United States and Texas Constitutions. On December 5, 1995, Defendants filed a notice of removal to this Court.

Plaintiffs Benningfield, Frankhouser and Grant (also designated herein as "Plaintiffs") are all female certified Class B police officers who were assigned to the Identification Division ("ID") of the City of Houston Police Department ("HPD"). Class B officers perform specialty functions with the Police Department including fingerprinting, criminal laboratory analysis, crime scene investigations, photography laboratory processing, firearms analysis, and other similar functions. All Class B officers are certified pursuant to the Texas Commission on Law Enforcement Standards and Education (TCLEOSE) and have attended the Police Academy.

Benningfield began her employment the City of Houston on July 8, 1975 as a clerk. In 1978, she became a sworn certified Class B peace officer and is a currently assigned to the ID Division. Frankhouser began her employment with the Police Department on September 11, 1967 and became a sworn classified Class B peace officer on

November 11, 1972. After twenty (20) years with the HPD, Frankhouser retired and is currently an Automated Fingerprint Identification System ("AFIS") Coordinator with the Montgomery County Sheriff's Department. Grant joined the HPD and became a sworn classified Class B peace officer on November 27, 1977. On December 18, 1992, Grant entered into medical retirement from the HPD.

In 1985, the Plaintiffs complained of discrimination and hostile working conditions in the ID Division under the former administrator, Andra Runnels. Thereafter, an Internal Affairs Division ("IAD") investigation and an inspections audit were conducted. The Plaintiffs allege that Audra Runnels was forced to resign as a result of the complaints and investigation.[1] The Plaintiffs contend that Runnels, acting in concert with the other Supervisory Defendants, blamed them for his fathers resignation and the day he replaced his father and became Administrator, he engaged in retaliation against them and subjected them to various forms of discriminatory treatment ranging from discrimination in assignments to public humiliation in front of dignitaries, and told at least one employee "all women belong under your thumb, keep them there."

The Plaintiffs allege that after they filed complaints and reported the misconduct within the Division, which included contamination of criminal histories, mismanagement, discrimination and retaliation, the Supervisory Defendants, among a list of other things, accused Grant of making a "bum

---

[1] After Audra Runnels resigned, his son, Wade Runnels, replaced him as Administrator of the ID Division.

identifications" and subjected her to an unwarranted written reprimand; filed an IAD complaint against Benningfield falsely accusing her of stealing criminal history records; wrote letters to Management Review that the Plaintiffs were trouble makers and thus were not allowed to attend AFIS meetings; left a vacant position open for twenty four (24) months prevent Grant from receiving the position in order that a male would receive the position; denied Benningfield the opportunity to take an exam for promotion by ordering her to the Administrative Personnel Committee ("APC"); assigning Benningfield to perform AFIS training on night shift without any additional compensation, and when she objected the assignment was given to other employees who were paid overtime pay and not required to change their day shift hours; reducing Frankhouser's job performance rating; allowing male employees to go undisciplined for giving "bum" identifications and female employees were being terminated; ordering female employees to the APC to be evaluated for mental fitness for duty and allowing male employees to escape evaluations; and allowing male employees separate hotel accommodations at conferences and females were forced to share rooms.

The Plaintiffs further allege that the classified female officers who had seniority to obtain day shift positions would not be able to transfer, while male civilians hired to do the same job, with less seniority, would be assigned to day shift assignments based on civilian seniority and all male employee were assigned to the day shift.

Additionally, the Plaintiffs allege that other forms of discriminatory treatment included requiring females to use a sign out sheet in order to use the restroom, making comments

regarding females to use a sign out sheet in order to use the restroom, making comments regarding female employees' use of the restroom, and ostracizing the females who went often about having urinary tract infections; females were subjected to comments about their physical appearance, were not provided adequate working areas, were forced to work at desks where urine was leaking from the ceiling, were required to share rooms when traveling, and generally treated as second class employees; and female employees who made any mistake in the identification of fingerprints were severely disciplined and usually terminated, while males in the Division who made the same mistakes, even repeatedly, went undisciplined. The Plaintiffs further allege that males in the Division who possessed specialized training and knowledge were and continue to be given special assignments in their area of expertise and females who possessed specialized training and knowledge were not given special assignments.

The Defendants contend that their conduct concerning the Plaintiffs did not constitute gender discrimination, retaliation, or harassment, and nor did they treat the Plaintiffs unfairly. The Defendants contend that their alleged conduct relating to the decisions which they made in reference to the Plaintiffs' federal and state claims were authorized legitimate business and employment decisions for which they are entitled to immunity.

II. STANDARD OF REVIEW

The standard of review for a motion for summary judgment is whether the pleadings, discovery, and supporting affidavits show that there are no genuine issue of material fact. Fed.R.Civ.P.56(c); Boze v. Branstetter, 912 F.2d 801,

804-805 (5th Cir. 1990), citing Celotex Corp. V. Catrett, 477 U.S. 317, 320 (1986). The movant for summary judgment has the burden of showing that there are no genuine issues of material fact, and is entitled to a judgment as a matter of law. In deciding whether there is a disputed material fact issue precluding summary judgment , the evidence favorable to the non-movant will be taken as true and every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in their favor. Celotex Corp. V. Catrett, 477 U.S. at 320; Palmer v. Fayard Moving & Transp. Corp., 930 F.2d 437, 438 (5thCir. 1991).

Summary judgment is appropriate against the non-moving party when the non-moving party fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 321 (1986); cited in, Conticommodity Services, Inc. v. Ragan, 63 F. 3d 438, 441 (5th Cir. 1995). Moreover, mere allegations in the complaint are not sufficient. The non-moving party is required to identify specific evidence in the record, and to articulate the precise manner in which that evidence supported his claim. Ragan, 63 F-3d at 441. Citing, Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994), cert. denied, 115 S.Ct. 195 (1994).

Under Texas law, although pleadings, sworn or unsworn, generally do not constitute summary judgment proof, there are exceptions to this general principal. Cathey v. First City Bank of Aransas Pass, 758 S.W.2d 818, 821 (Tex.App.-Corpus Christi 1988). One such exception is that pleadings alone may show that a cause of actions is barred, as a matter of law, by an affirmative defense, such as limitations.

Cathey, 758 S.W.2d at 821, citing Uniroyal, Inc. v. Vega, 455 S.W.2d 783 (Tex.Civ.App. San Antonio 1970, no writ). Therefore, it is possible for the moving party to conclusively establish from the face of the petition that the prosecution of the non-moving party's cause of action is barred by limitations. See, Hays v. McNeice, 641 S.W.2d 695, 697 Tex.App. Amarillo 1981, no writ).

III. THE DEFENSE OF QUALIFIED IMMUNITY

In this case, the Defendants contend that they are entitled to sovereign and qualified immunity from the Plaintiffs federal and state law claims. Thus, prior to addressing the merits of the Plaintiffs claims, the court must determine whether or not the Defendants are entitled to a grant of immunity. The basic formulation of the qualified immunity standard is set out in Harlow v. Fitzgerald, 457 U.S. 800 (1982) and Anderson v. Crieghton, 483 U.S. 635 An official performing discretionary functions has qualified immunity from damages so long as reasonable official in the defendant's position could have believed his conduct was lawful, in light of clearly established laws and the information possessed by that official at the time of the challenged conduct.

In Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991), the Supreme Court enunciated the analytical structure under which a claim of qualified immunity should be addressed. The first inquiry in the examination is whether the Plaintiffs have properly alleged a violation of a clearly established constitutional right. Siegert at 1793. The question of whether the Plaintiffs have asserted the violation of a constitutional right at all, is a purely legal question.

Therefore, prior to considering whether a Defendant is entitled to qualified immunity, the Court must first address the "threshold" consideration of whether the Plaintiffs' complaint even states a violation of the constitutional right. Idoux v. Lamar University System, 828 F. Supp. 1252, 1256 (E.D.Tex. 1993). If the Plaintiffs have asserted a violation of a constitutional right, the Court must then determine whether that right had been clearly established so that a reasonable official in the Defendant's situation would have understood that his conduct violated that right. Brewer v. Wilkinson, 3 F.3d 816, 820 (5 Cir. 1993), cert. denied, 114 S.Ct. 1081 (1994). Thus, once a Defendant pleads a defense of qualified immunity on summary judgment, the Court may appropriately determine not only current applicable law, but whether the law was clearly established at that time, and whether the Defendant believed that his conduct was lawful.

A. The City's Sovereign Immunity From the Plaintiffs' Claims

As a municipality, the City of Houston is considered a political subdivision of the State of Texas. Tex. Civ. Prac. & Rem. Code Ann. §101.001(2)(B)(Vernon Supp.1994). Under the common-law doctrine of sovereign immunity, municipalities were historically immune from liability as agents of the State. Lawrence v. City of Wichita Falls, 906 S.W.2d 113, 115 (Tex.App. Fort Worth 1995, writ). Under Texas law, the functions of a municipal entity fall into one of two categories: governmental or proprietary functions. Houston v. Southwest Concrete Constr., Inc., 835 S.W.2d 728, 730-31 (Tex.App. Houston [14th Dist.] 1992, writ denied). The City is entitled to immunity only for the functions considered to be governmental functions. Those

functions, which the municipality carries out as an arm of the State for the purpose of serving the general public, are termed "governmental functions." Id. at 730. Police protection and control are considered governmental functions. Tex. Civ. Prac. & Rem. Code Ann. §101.0215(a)(1)(Vernon Supp.1994). Thus, when functioning in the capacity of providing the police protection and control, a municipality is afforded state sovereign immunity.

Sovereign immunity, however, is not absolute and can be waived. A municipality, functioning in the capacity of providing police protection and control, is afforded state sovereign immunity, under Texas law, except to the extent the State has waived the municipality's immunity under the Texas Tort Claims Act. University of Texas Medical Branch at Galveston v. York, 871 S.W.2d 175, 177 (Tex.1994); Tex.Civ. Prac. & Rem. Code Ann. §101.001 et.seq. (Vernon 1986 & Supp.1994). The Texas Tort Claims Act waives immunity for governmental units for certain claims. Under the Act, a governmental entity is liable for personal injury claims caused by the wrongful act or omission or the negligence of an employee acting within the course and scope of his employment if the injury was caused by a condition or use of personal or real property. Tex.Civ.Prac. & Rem. Code Ann. §101.021 (Vernon 1986 & Supp.1994). Thus, once the employee is found negligent, liability attaches to the sovereign vicariously through the negligence of the employee by virtue of the doctrine of respondeat superior. However, if the government employee has official immunity, the governmental entity also has sovereign immunity as to respondeat superior liability. See DeWitt v. Harris County, 904 S.W.2d 650, 654 (Tex.1995).

In this case, the Court concludes that, along with being the employer, the City was performing governmental functions in the capacity of providing police protection and control. Therefore the City is entitled to sovereign immunity only to the extent it did not waive its entitlement under the Texas Tort Claims Act. The Plaintiffs contend that the City waived its entitlement to immunity under the Texas Tort Claims Act because the Supervisory Defendants used the AFIS system to discriminate, harass, and retaliate against them. However, the Plaintiffs' alleged injuries were not caused by the use of the AFIS system as alleged. It is clear that the Plaintiffs alleged injuries were caused, not by the use of the AFIS system, but by the conduct, if any, of the Supervisory Defendants. Therefore, the City did not waive its entitlement to sovereign immunity under the Texas Tort Claims Act because the Plaintiffs' injuries were not caused by a condition or use of personal or real property. Accordingly, the City is entitled to sovereign immunity.

B. The Supervisory Defendants Federal Immunity From Plaintiffs §1983 Claims

Section 1983 provides a cause of action for state deprivation of the rights and privileges secured by federal law. However, federal immunity law shields state officials from personal liability under federal law for civil damages as long as their conduct could reasonably have been thought consistent with the rights they are alleged to have violated. Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039 (1987). Whether an official is entitled to qualified immunity depends on the "Objective legal reasonableness" of the official's actions as measured by clearly established law. The right the official is alleged to have violated must have

been clearly established at the time that the conduct in issue occurred. Cantu v. Rocha, 77 F.3d 795, 806 (5th Cir. 1996). Furthermore, the contours of the right must be sufficiently clear that a reasonable official would understand the conduct in issue constitutes a violation. Where reasonable public officials differ on the lawfulness of the official's actions, the official is entitled to immunity. Id., *citing* Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994). Qualified immunity protests all but the plainly incompetent or those who knowingly violate the law. Anderson, 107 S.Ct. At 3038.

In this case, the Defendants contend that they are entitled to qualified immunity from the Plaintiffs federal and state claims. The Court understand the Plaintiffs' federal claims to be invasion of privacy, freedom of speech, and sex discrimination under 42 U.S.C. §1983.

1. Plaintiffs' Claim of Invasion of Privacy

The Plaintiffs allege that the Supervisory Defendants intentionally or negligently invaded their privacy. Specifically, the Plaintiffs allege that the Supervisory Defendants made inquiries concerning their private affairs and imposed unreasonable and burdensome working conditions on them which were calculated to and did interfere with their private lives.

The right to privacy consists of two inter-related strands; one protects an individual's interest in avoiding disclosure of personal matters (the confidentiality strand) and the other protects an individual's interest in making certain personal decisions free of government interference (the autonomy strand). Cantu v. Rocha, 77 F.3d 795, 806 (5th

Cir. 1996), *citing* Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir. 1981). The Plaintiff' privacy right claim is analyzed under the confidentiality strand. In the context of government disclosure of personal matters, an individual's right to privacy is violated if: (1) the person had a legitimate expectation of privacy; and (2) that privacy interest outweighs the public need for disclosure. Id. A plaintiff cannot claim that her privacy has been invaded when allegedly private materials have been disclosed to those who already know the details of that material. Id., *citing* Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 189 (1994).

To support their claims, Plaintiff Benningfield offered evidence that her right to privacy was violated when HPD and the Supervisory defendants initiated a search for her whereabouts during her three (3) day absence from work without leave; Plaintiff Grant proffered evidence that a number of her photos were taken and subsequently thrown away, and that the removal of a partition which she used to privatize her work station constituted an invasion of privacy. Plaintiffs Benningfield and Grant also alleged that the department's inquiries and their individual referrals to the APC violated their rights to privacy. Additionally, the Plaintiffs contend that their work shift assignments during their tenure as police officers imposed unreasonable and burdensome working conditions which were calculated to interfere with their private lives.

Benningfield, due to job-related emotional distress, left her pace of employment and remained absent for three (3) days without informing or notifying her superiors of her whereabouts. The Defendants contend that, due to Benningfield's unexplained disappearance, they ordered a

search for her whereabouts through HPD because they were concerned about her safety. Based upon this search, Benningfield claims that her privacy rights were violated apparently because she believed that no search was warranted and she should have been left alone. Although it is clear that there is a clearly established constitutional right to privacy, it does not appear that Benningfield's privacy rights were violated in this instance. Benningfield has failed to show that she had a clearly established constitutional right to be free from an investigative search to determine her official whereabouts under the circumstances which led to her absence from her work. Furthermore, there was no evidence presented that the search conducted by the Defendants invaded any area where Benningfield had a legitimate expectation of privacy. The actions of the Defendants in attempting to locate Benningfield, under the circumstances, were objectively reasonable and a prudent official would not have understood this conduct to constitute violation of any privacy rights afforded under the Constitution.

Likewise, Grant has not shown that there was a violation of any clearly established constitutional right to not have the partitions removed from her work station. There was no evidence presented to show that she had a legitimate expectation of privacy in her work station in side the HPD. Furthermore, Grant also failed to established that the Defendants were responsible for the removal of her photos and deprived her of any constitutional privacy interest in the photos.

In their remaining allegations, the Plaintiffs have failed to show that any clearly established constitutional right to privacy was violated by the Defendants' conduct in arranging

and scheduling work assignments which allegedly affected their private lives. Furthermore, a reasonable official in the Defendants' position would not have understood their conduct to be a violation of any of the Plaintiffs' right to privacy. Therefore, for these reasons, the Defendants are entitled to immunity on the Plaintiffs' claims of invasion of privacy.

2. Freedom of Speech

The Defendants contend that the Plaintiffs failed to establish they are unable to show that their internal complaints of mismanagement are matters of public concern. The Plaintiffs contend that their right to free speech was violated by the Defendants when they reported disparate treatment, gross mismanagement, deliberate falsification of criminal histories, unauthorized changes to criminal histories, and other contamination and unauthorized disclosure of protected information with the ID Division. Apparently the Plaintiffs contend that their right o free speech has been violated because the defendants refused to inspect or examine the criminal records after receiving the reports and information supplied by Benningfield to IAD in support of her report mysteriously disappeared.

In order to be protected by the First Amendment, an employee of a governmental entity must speak out on a matter of public concern. Whether a matter is of public concern is the threshold issue that must be determined by the content, form and context of a given statement as revealed by the whole record. Connick v. Myers, 461 U.S. 138, 147-48 (1983). The Plaintiffs contend that their complaints raise questions of public concern due to the possible contamination of criminal histories cause by mismanagement. However,

issues raised by an individual speaking primarily in his role as an employee, rather than a citizen, do not rise to the level of public concern. Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1991). Based upon the content, form and context of the Plaintiffs' statements revealed by the record, it appears that the Plaintiffs' statements were not a matter of public concern in regards to their rights of free speech. Therefore, the Plaintiffs have failed to show that the Defendants violated their constitutional rights to free speech. Accordingly, the Defendants are entitled to immunity on the Plaintiffs' claim that their right to free speech was violated.

3. Plaintiffs Claims of Sex Discrimination

The Plaintiffs contend that the Defendants violated §1983 by performing acts of sex discrimination and retaliation against them. The Plaintiffs allege that the defendants conduct included, among other things, disciplining female employees and allowing male employees to go undisciplined; sending female employees to the APC for evaluation and not male employees; preventing female employees from attending training sessions; causing females to be constructively discharged; denying females the opportunity to take promotion exams; subjecting females to personal attacks, and other actions of discrimination, retaliation and harassment. The Defendants contend that the Plaintiffs cannot sustain a §1983 cause of action against the City because their gender discrimination and retaliation claims could not have been brought under Title VII and as a matter of law, Title VII provides the exclusive remedy. Additionally, the Supervisory Defendants contend that they cannot be held personally liable under the qualified immunity doctrine.

It is clear that the City may only be held liable under Title VII and not for claims under §1983. However, in order to recover against the Supervisory Defendants, the Plaintiffs must show that the acts or omissions of the Defendants amounted to gross negligence or deliberate indifference of the Plaintiffs' rights. Auster Oil & Gas, Inc. V. Stream, 835 F.2d 597, 602 (5th Cir. 1988); *see also* Cantu v. Rocha, 77 F.3d at 807; *citing* Bowen v. Watkins, 669 F.2d 979, 988 (5th Cir. 1982). Furthermore, although supervisory officials cannot be held liable under §1983 on a theory of respondeat superior, they may be liable if their own actions or inactions, including a failure to properly supervise, amounts to gross negligence or deliberate indifference. Cantu at 807.

In this case, there remains unresolved genuine issues of material fact as to whether the Supervisory defendants' conduct evidences deliberate indifference, and there are unresolved fact issues as to whether Supervisory Defendants discriminated against Plaintiffs based upon their gender. Therefore a grant of summary judgment on the basis of immunity is unwarranted.

C. State Immunity from Plaintiffs' Tort Claims

The Defendants contend that the City is entitled to sovereign immunity and the Supervisory Defendants are entitle to qualified immunity from the Plaintiffs' state law tort claims. The Plaintiffs contend that the Defendants conduct under Texas law constituted (1) state law invasion of privacy; (2) tortious interference with a business relationship; (3) intentional infliction of emotional distress; (4) premise liability or failure to maintain a reasonably safe work environment; (5) defamation; (6) negligent hiring, retention

and supervision; and (7) civil conspiracy.

Under Texas law, government officials are entitled to immunity from suit arising from performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. Cantu v. Rocha, 77 F.3d 795, 804 (citing City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex.1994). Texas law insulates government officials from the burden of suit, as well as from civil liability for damages. An official is acting within the scope of granted authority for immunity purposes when discharging duties generally assigned to that official, even though the official may be acting unlawfully. Furthermore, an official acts in "good faith" if any reasonably prudent official could have believed that the conduct was consistent with the plaintiffs' rights. City of Lancaster, 883 S.W.2d at 656-57. Under Texas law, qualified or official immunity is substantially the same as federal immunity law. However, there is one difference. Summary judgment is not appropriate, under Texas law, simply on a showing that the right alleged to have been violated was not clearly established. The "good faith" test for immunity for nonconstitutional torts does not incorporate a threshold legal question analogous to federal immunity law's "clearly established law" requirement. Texas' test focuses solely on the objective legal reasonableness of the official's conduct. Accordingly, whether the Supervisory Defendants are entitled immunity of any of the Plaintiffs' state law claims depends solely on whether their actions were objectively reasonable. Cantu at 808-09.

1. State Law Invasion of Privacy

Under Texas law, there are two (2) elements to invasion of privacy (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion or private affairs or concerns, which (2) would be highly offensive to a reasonable person. Valenzuela v.Aquino, 853 S.W.2d 512, 513 (Tex. 1993). A claim of public disclosure of private matters is actionable when publication would be highly offensive to a reasonable person and there is no legitimate public concern meriting disclosure. In such a case, the information disclosed must have been confidential, in the sense that it was previously secret and that disclosure would cause harm. Cantu at 809 (citing Industrial Foundation of the South v. Texas Indus. Accident Bd., 540 S.W.2d 668, 682-83 (Tex.1976), cert denied, 97 S.Ct. 1550 (1977).

In this case, the Plaintiffs' claim of invasion under state law is identical to their claim for invasion of privacy under federal law which was discussed previously. The Plaintiffs allege that the Supervisory Defendants made inquiries concerning their private affairs and imposed unreasonable and burdensome working conditions on them which were calculated to and did interfere with their private lives. However, the Plaintiffs have not proffered any evidence that the Defendants disclosed any of their private or secret matters, and that they were harmed thereby. Thus, based on the conduct alleged, the Plaintiffs have failed to establish that the Defendants intruded upon their solitude, seclusion, or private affairs or concerns. Furthermore, the Plaintiffs have failed to show that THE Defendants conduct was highly offensive to a reasonable person.

Moreover, in order for the Plaintiffs to overcome the defendants claim of immunity, they must show that the

Defendants were acting outside the scope of their authority and in faith. Based upon the conduct alleged, the Plaintiffs have failed to show that the Defendants discretionary acts were performed in bad faith and outside the scope of their authority. Furthermore, a reasonable prudent officer in the Defendants' position could have believed his actions were consistent with the privacy rights of the Defendants. Thus the Defendants are entitled to state law immunity from suit on the Plaintiffs state law invasion of privacy claim.

2. Tortious Interference With A Business Relationship

The Defendants contend that they are entitled to immunity of the Plaintiffs' claim of tortious interference with business relations because the City and HPD are parties to Plaintiffs' employment relationship and are legally incapable of tortiously interfering with their own relationship, and there is no evidence that any of the actions were motivated by personal animus or greed. Furthermore, the Defendants contend that their actions were justified and privileged because they were acting within the scope of their employment; and thus, they can not be liable for tortious interference relating to actions that were not wrongful.

The Plaintiffs contend that the Defendants may be held liable for tortiously interfering with their business relationships because of their harassment and retaliatory tactics. The Plaintiffs further contend that the Supervisory Defendants acted beyond the scope of their authority and in furtherance of personal objectives in retaliating against them for being instrumental in bringing about the resignation of Runnel's father as Administrator of the ID division and for

reporting violations within the AFIS Section. The Plaintiffs also allege that the Defendants actions of personal animus, retaliation and harassment created a hostile working environment for women which included filing false accusations relating to job performance; making false accusations of stealing criminal history records; disciplining female employees and allowing male employees to go undisciplined; sending female employees to the Administrative Personnel Committee to be evaluated for being mentally fit for duty and allowing male employees to escape evaluation; not allowing female employees to attend training sessions; subjected females to personal attacks; not allowing female employees the opportunity to advance in positions; denying females the opportunity to take exams for promotions; causing females to be constructively discharged or resign from employment; and other acts of discrimination, retaliation and harassment.

Under Texas law, a claim of interference with a business relationship is similar to the tort of contract interference. CF&L Steel Corp. V. Pete Schlett and Co., 623 S.W. 2d 707, 715 (Tex.Civ.App.-Houston [1st Dist.] 1981, writ ref'd n.r.e). Texas law recognizes a cause of action for either interference with existing or with prospective contractual relations. Juliette Fowler Homes v. Welch Assoc., Inc., 793 S.W.2d 660, 665 (Tex 1990); Exxon Corp. V. Allsup, 808 S.W.2d 648, 659 (Tex.App. Corpus Christie 1991, writ denied). The Plaintiffs are complaining of tortious interference with an existing contact. Tortious interference with an existing contract consists of (1) the existence of a contract subject to interference; (2) a willful and intentional act of interference; (3) such act was a proximate cause of damage; and (4) actual damage or loss occurred. Hi-Line

Elec.Co. V. Dowco Elec. Prods., 765 F.2d 1359, 1361 (5th Cir. 1985); Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 926 (Tex. 1993).

The second element of this cause of action is a particular importance when the Defendant serves the dual roles of the entity's agent and the third party who allegedly interfered with the relationship. Holloway v. Skinner, 898 S.W. 2d 793, 796 (Tex.1995). To establish a prima facie case under these circumstances, the alleged act of interference must be performed in furtherance of the Defendant's personal interests so as to preserve the logically necessary rule that a party cannot tortiously interfere with its own contract. In order to meed this burden, the Plaintiffs must show that the Defendants acted in a fashion so contrary to the entity's best interests that their actions could only have been motivated by personal interests. Holloway at 796. Thus, an agent may be held liable for tortious interference when there is evidence that the was acting in furtherance of personal objectives. B., Inc. v.Miller Brewing Co., 663 F.2d 545, 553 (5th Cir. 1981); American Medical Int'l v. Giurintano, 821 S.W. 2d 331, 335 (Tex.App. Houston [14th Dist.] 1992, no writ). Furthermore, when evidence is shown that the Defendants acted in the furtherance of personal objectives, the issue of liability turns upon a disputed question of substantive fact. B., Inc. v. Miller Brewing Co., 663 F.2d 545, 553 (5th Cir. 1981). Thus, if during the trial, it is established that the Defendants were motivated by personal animus or greed, then the Defendants may be held liable for tortious interference. Id.

Moreover, it is not necessary to establish the existence of a valid contract for the Defendants interference with a

general business relationship to be actionable if the Defendants interference is proven to be motivated by malice. CF & I Steel Corp. v. Pet Sublet & Co., 623 S.E.2d 709, 715 (Tex.Civ.App. Houston [1st Dist.] 1981, writ ref'd n.r.e.); *see also* Deauville Corp. V. Federated Dep't Stores, Inc., 756 F.2d 1183, 1196 (5th Cir. 1985). Malice is defined as intent to harm. Verkin v. Melroy, 699 F.2d 729, 733 (5th Cir. 1983). The malice required under this cause of action is not ill will, but instead is an unlawful act, done intentionally without just cause or excuse. Exxon, at 659.

In order for the interference to be wrongful, it must not have been justified or privileged. Such interference is justified or privileged if it is done in a bona fide exercise of that party's own rights, or if that party has an equal or superior right in the subject matter to that of the other party. Victoria Bank & Trust Co. v. Brady, 811 S.W.2d 931, 939 (Tex 1991). Thus, a person is privileged or justified to interfere with the business relations of another with the motive and purpose, at least in part, to advance or protect his own business or financial interest. Times Herald Printing Co. v. A.H. Belo Corp., 820 S.W. 2d 206, 215 (Tex.App. Houston [14th Dist.] 1991, no writ). However, the fact that the Defendants' actions may have been legally justified or privileged is an affirmative defense to the action, not an element of the action, and the Defendants bears the burden of pleading and proving the defense. Kiepfer, 944 F.2d at 1220; Sterner v. Marathon Oil Co., 767 S.W.2d 686, 689-90 (Tex.1989).

In addressing the immunity issue under this claim, the Court must determine whether the actions of the Supervisory Defendants were objectively reasonable. Also, for summary

judgment purposes, the facts must be viewed in the light most favorable to the non-movant. Thus, in order for the Court to resolve the immunity issue, the court must determine whether the conduct of the Defendants was objectively reasonable based upon a view of the facts in a light most favorable to the Plaintiffs. In viewing the facts in the light most favorable to the Plaintiffs, there remains unresolved fact issues as to whether the Supervisory Defendants acted in the furtherance of personal objectives, thus, the issue of liability against the Supervisory Defendants turns upon a disputed question of substantive material fact. Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993); B., Inc. v. Miller Brewing Co., 663 F.2d 545, 553 (5th Cir. 1981). Therefore, the Defendants are not entitled to summary judgment on their claim for immunity from this cause of action, although the Defendants may still assert qualified immunity at trial. Harper v. Harris County, 21 F.3d 597, 601 (5th Cir. 1994).

3. Intentional Infliction of Emotional Distress

The Defendants contend that the Plaintiffs are unable to show facts sufficient to establish that the Supervisory Defendants' conduct was outside the realm of ordinary employment disputes. Furthermore, the Defendants alleged that the conduct is question does not rise to the level of "extreme and outrageous" conduct required by law to state a claim for international infliction of emotional distress.

The Plaintiffs allege that as a direct result of the Defendants conduct, they suffered injuries in the form of severe emotional distress, mental anguish, degradation, humiliations, embarrassment, fright, shame, anger, disappointment, worry, severe grief, and physical injury and

thus are entitled to relief.

In order to recover under a claim of intentional infliction of emotional distress the Plaintiffs must establish that (1) the Defendants acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the actions of the Defendants caused the Plaintiffs emotional distress; and (4) the resulting distress was severe. Burden v. General Dynamics Corp., 60 F.3d 213, 218 (5th Cir. 1995); Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex.1993). The Plaintiffs allege that the extreme and outrageous conduct of the Supervisory Defendants is evidenced by Frankhouser's lowered performance evaluation; Benningfield's training assignments at the academy and the division being changed; Benningfield's denied travel request; Benningfield and Frankhouser's sharing a hotel room at official conferences; Benningfield not being allowed to take a promotional exam; Grant's personal items being removed; Grant's partitions being removed from her work stations; Benningfield being disciplined after her three day absence; and Benningfield and Grant's referrals to APC for determination of their fitness for duty. The Plaintiffs further contend that the Defendant's conduct of deliberate retaliation, intimidation and reprisals were calculated to undermine the Plaintiffs' emotional well being and to silence and discredit them for reporting misconduct within the ID that was contaminating criminal histories and reporting discriminatory practices.

In their defense, the Defendants contend that in the course of managing its business, the City and Supervisory Defendants found it necessary to make such decisions and take such actions against Benningfield, Frankhouser and Grant. Furthermore, the actions taken against the Plaintiffs are

precisely the sort of ordinary employment disputes which fall outside the realm of intentional infliction of emotional distress. The Defendants further contend that these actions were in no way based upon the Plaintiffs' sex nor were they done to undermine the Plaintiffs' emotional well being and to silence and discredit them for reporting misconduct.

Although "extreme and outrageous" as used in the second element of this standard is an amorphous phrase that escapes precise definition, when analyzing "extreme and outrageous" conduct, liability is imposed only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. MacArthur v. Univ. Of Texas Health Center, 45 F.3d 890, 898 (5th Cir. 1995); Worwick 856 S.W. 2d at 734.

The Fifth Circuit has determined that a claim for intentional infliction of emotional distress will not lie for the broad range of conduct labeled mere employment disputes. MacArthur at 898; Johnson v. Merrel Dow Pharmaceuticals, Inc., 965 F.2d 31, 33 (5th Cir. 1992). Thus, the courts recognize that in order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer, and discipline its employees. Johnson at 34. Consequently, liability of intentional infliction of emotional distress does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities which are not deemed as extreme or outrageous. Ugalde v. W.A. McKenzieAsphalt Co., 990 F.2d 239, 243 (5th Cir. 1993).

Accordingly, although the actions by the Defendants

may not have been necessary, the Plaintiffs have failed to show that the Defendants' actions reached the level of "extreme and outrageous" conduct to satisfy their claim of intentional infliction of emotional distress. Even assuming its veracity, and that a jury fully believed every word of it, the Plaintiffs' evidence simply could not, as a matter of law, be construed by reasonable jurors as proof of conduct that is "beyond all possible bounds of decency and utterly intolerable in a civilized community." Thus, the Defendants are entitled to state law immunity from suit on the Plaintiffs state law claim of intentional infliction of emotional distress.

4. Premise Liability or Failure to Maintain a Reasonable Safe Work Environment

The Defendants contend that the Plaintiffs' claim of premise liability or negligence in failing to maintain a reasonable safe work environment must fail because the duty is confined to construction, physical condition and equipment. The Supervisory Defendants further contend that such an action is not properly raised against them because they are not the employer. The plaintiffs contend that the Supervisor Defendants were negligent, in their official capacity, in failing to maintain a reasonably safe work environment, and this claim is based upon the Defendants' alleged conduct of discrimination, retaliation, and harassment in the workplace.

Texas law requires every employer to furnish and maintain employment and a place of employment which is reasonably safe and healthful for employees. Horton v. Montgomery Ward, 827 S.W. 2d 361, 370 (Tex.App. San Antonio 1992, writ denied); Tex.Rev.Civ.Stat.Ann. Art 5182a §3 (West 1987). However, the Plaintiffs have not

alleged acts that constitute the tort of premise liability under Texas law. Thus, under the facts alleged, because the Plaintiffs have failed to state a claim of premise liability, the Defendants are entitled to immunity under state law for this claim. See Cantu, 77 F.3d at 810.

5. Defamation

The Supervisory Defendants contend that the Plaintiffs' defamation claims center around Benningfield and Grant's referral to the Administrative Personnel Committee. Furthermore, the Defendants contend that a referral to APC is privileged because it is made in accordance with the City's responsibilities to settle any question of whether or not an employee is fit for duty as an officer, and thus they are entitled to immunity on this claim. The Plaintiffs contend that their defamation claims against the Supervisory Defendants are based upon verbal and written communications in which they were accused of being unfit for duty, mentally incompetent, troublemakers, having their own agendas, and other derogatory comments. The Plaintiffs further contend that many of the defamatory comments, such as accusations that Benningfield was out to get her co-workers, were communicated by Runnels and Fleming to those co-workers with the intent to foster animosity.

Under Texas law, slander is a defamatory statement that is orally communicated or published to a third personal without legal excuse. Randalls Food Markets, Inc. V. Johnson, 891 S.W. 2d 640, 646 (Tex.1995). In suits brought by private individuals, the truth is an affirmative defense to slander, Id. Furthermore, accusations or comments about an employee by his employer, made to a person having an

interest or duty in the matter to which the communication relates, have a qualified privilege. Schauer v. Memorial Care Systems, 856 S.W.2d 437, 449 (Tex.App.-- Houston [1st Dist.] 1993). However, this privilege protects such communications only in the absence of malice. In the defamation context, a statement is made with malice when the statement is made with knowledge of its falsity, or with reckless disregard as to its truth of their publications. Randall at 646. A finding of malice requires sufficient evidence to permit the conclusion that the Defendants in fact entertained serious doubts as to the truth of their publications. Ragan, 63 F.3d at 442. Moreover, if the communications are made to persons other than those having an interest or duty in the investigation, there is no privilege.

To invoke the privilege on summary judgment, an employer must conclusively establish that the allegedly defamatory statement was made with an absence of malice. Randalls at 442. However, if there is no clear evidence of actual malice, then summary judgement is proper on a claim of defamation. Ragan at 642-43.

The Defendants have invoked the affirmative defense of privilege regarding the communications made; thus, in order to overcome this defense, the Plaintiffs must show either that (1) the Defendants acted with malice; or (2) the persons to whom the alleged defamatory statements were published did not have a common interest. Ragan at 443. The Plaintiffs argue that there is no privilege because the persons to whom the defamatory statements were published did not have a common interest, and the statements were made with malice. To support this claim, the Plaintiffs contend the HPD orders require referrals to the APC to be kept

confidential, yet when Defendant Nuchia referred Plaintiffs Benningfield and Grant to APC, Defendants Runnels and Fleming were given the notice and left it in open view in the Division.

The Plaintiffs have failed to proffer any evidence showing that the verbal or written communications of the Defendants were made with knowledge of its falsity or with reckless disregard of its truth. Furthermore, the Plaintiffs have failed to show that the communications were made to person other than those having an interest or duty in the matter to which the communication related to. Both Benningfield and Grant were employed in the ID Division. Based upon the summary judgment record, Runnels was the Chief Administrator of the ID Division and direct supervisor to Benningfield, and Fleming was the Assistant Administrator of the ID Division. Thus, Runnels and Fleming had a job-related interest in the information regarding Benningfield and Grant's referrals to APC as employees under their supervision. Although Runnels and Fleming may have bean negligent for leaving the referral notices in open view, the Plaintiffs have failed to provide any evidence that the verbal or written communications made by the Defendants were performed with malice. The Plaintiffs have also failed to provide any evidence that the information concerning the referrals were communicated to persons other than those having an interest in the matter. Thus, the Defendants are entitled to state law immunity from suit on the Plaintiffs state law claim of defamation.

Additionally, the Defendants contend that the Plaintiffs' claim of defamation is time-barred according to the Texas one (1) year statute of limitations to bring such claims.

Under Texas law, there is a one (1) year statute of limitations for defamations claims. TEX.CIV.PRAC. & REM.CODE ANN. §16.002 (Vernon 1986). Conversely, the Plaintiffs contend that the discovery rule prevents their defamation claims from being time-barred. Because the Court has determined that the Plaintiffs have failed to satisfy the legal requirements of bringing a claim of defamation against the Defendants, and the Defendants are entitled to immunity, the statute of limitations issue need not be addressed.

6. Negligent Hiring, Retention and Supervision

The Defendants contend that the Plaintiffs have not properly raised a cause of action of negligent hiring, retention, and supervision. Conversely, the Plaintiffs contend that the City is liable for negligent hiring, retention and supervision of the Supervisory Defendants. Specifically, the Plaintiffs allege that their claims arise out of the City's failure to supervise Fleming and Runnels, and to ultimately fire them. The Plaintiffs further contend that the evidence establishes that the City knew Runnel's conduct warranted termination, but in order to avoid conflict, deliberately sabotaged the IAD investigation of Benningfield's complaint. Furthermore, every investigation of the ID Division concluded that there was disparate treatment, mismanagement, and callous indifference to the criminal history problem, yet, rather than addressing these issues, the City repeatedly covered them up at the Plaintiffs' expense. Thus, such conduct gives rise to a fact issue as to whether the City's own negligence was a producing cause of Plaintiffs' injuries.

As a general rule, a person has no duty to protect another from the conduct of a third party. However, the tort

of negligent hiring is an exception to the general rule. Akins v. Estes, 888 S.W.2d 42 (Tex.App--Amarillo 1994, no writ). Texas courts have long recognized the employer's duty to make inquires about the competence and qualifications of those it considers for employment. Duran v. Furr's Supermarkets, Inc. (Tex.App.--El Paso 1996); see also Estate v. Arrington v. Fields, 578 S.W 2d 173, 178 (Tex. App.--Tyler 1979, writ ref'd n.r.e). Negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual. Thus, a claim of negligent hiring is based on a defendant's direct negligence rather than that defendant's vicarious liability for the torts of its workers. Akins v. Estes, 888 S.W.2d at 42; Doe v. Boys Clubs of Greater Dallas, Inc., 868 S.W.2d 942, 950 (Tex App.--Amarillo 1994, writ granted).

The basis of responsibility under the doctrine of negligent hiring is the master's own negligence in hiring or retaining in his employ an incompetent servant whom the master knows or by the exercise of reasonable care should have known was incompetent or unfit and thereby creating an unreasonable risk of harm to others. Peek v. Equipment Services, Inc., 906 S.W.2d 529, 534 (Tex.App.-San Antonio 1995, no writ). Therefore, a cause of action for negligent hiring and retention requires a showing that the employee (1) is incompetent or unfit and (2) the employer knew or in the exercise of ordinary care should have known of the incompetence or unfitness. Id.

In this case, the Plaintiffs must show that the City was negligent in its hiring retention and supervision of the Supervisory Defendants. In order to show that the City is liable under this claim, the Plaintiffs must establish that the

City was negligent by knowingly failing to supervise its incompetent or unfit employees. Negligence, a common law doctrine, consists of three essential elements (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damages proximately resulting from the breach. Peek at 534; El Chico Corp. v. Pool, 732 S.W.2d 306, 311 (Tex. 1987). Consequently, the failure to establish any one of the essential elements would defeat a cause of action based on negligence.

It is clear that the City had a duty to insure that its employees were competent and fit for the position in which they were employed. It is also clear that the City had a duty to properly supervise its employees. In defending its obligation of fulfilling its duty under this claim, the City proffered evidence that each of the Supervisory Defendants had (1) their background checked prior to hiring; (2) a semi-annual performance review; (3) taken and passed promotional examinations which are based upon the relative factors necessary to competently perform in their positions; and (4) endured numerous Internal Affairs Division (IAD) investigations based upon the Plaintiffs' allegations.

Based upon the proffered evidence, the Supervisory Defendants appear to have been competent and qualifiedly fit for their respective positions. The City made reasonable inquiries into the competence and qualifications of the individually named Defendants prior to hiring them and throughout their continued employment. Thus, the City took reasonable actions in order to insure that its employees remained competent and fit for the employment to which they were assigned.

Because the Plaintiffs did not proffer any evidence to show that the Defendants were incompetent and unfit employees, they failed to establish that the City breached its duty to properly supervise the Supervisory Defendants.

Accordingly, the Defendants are entitled to immunity on the Plaintiffs' claim of negligent hiring, supervision and retention.

7. Civil Conspiracy Claim

The Defendants contend that they are entitled to summary judgment as a matter of law on the Plaintiffs' claim of civil conspiracy. The Plaintiffs' contend that their claim of civil conspiracy against the Defendants is viable.

Under Texas law, an actionable civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. Elliott v Tilton, 89 F.3d 260, 264 (5th Cir. 1996), *citing* Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex.1983). However, the acts of a city's agent are the acts of the city, and a city cannot conspire with itself, no matter how many of its agents participate in the action complained of. See e.g. Elliot at 264. The Supervisory Defendants are alleged by the Plaintiffs to have conspired with the City or the Civil Service Commission, an arm of the City against the Plaintiffs. However, as a matter of law, the City and its employees cannot conspire with itself. Thus, the Plaintiffs' claim must fail and the Defendants are entitled to summary judgment.

IV. DISMISSAL OF GRANT'S TORT CLAIM AS UNTIMELY

Based upon the reasoning set forth above, the only claims regarding Grant which need to be addressed, for statute of limitations purposes, are her claims of sex discrimination and tortious interference with business relations.

The Defendants contend that all of Grant's tort allegations should be dismissed as untimely on statute of limitations grounds. Specifically, the Defendants contend that Grant's tort claims should be dismissed because the last alleged wrongful act of notifying the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) of her retirement was not a wrongful act.

Conversely, Grant contends that her tort claims are not barred by the statute of limitations, as Defendants engaged in ongoing wrongful conduct, constituting a continuing tort.

A. Grants Claim of Sex Discrimination Under §1983

Under Texas law, civil rights actions are deemed analogous to Texas tort actions, and therefore, the applicable limitations period is two (2) years, fixed by Article 5526 of the Vernon's Texas Annotated Statutes, and now recodified as Tex.Civ.Prac. & Remedies Code Ann. §16.003 (Vernon 1986). Helton v. Clements, 832 F.2d 332, 334 (5th Cir. 1987); see also Flores v. Cameron, 92 F.3d 258, 271 (5thCir. 1996). Although state law controls which limitations period applies, federal law determines when a cause of action accrues. Helton v. Clements at 334, Slack v. Carpenter, 7

F.3d 418, 419 (1993); Moore v. McDonald, 30 f.3d 616, 620 (1994). A cause of action accrues in civil rights actions in this circuit when a plaintiff knows, or has reason to know of the injury which is the basis for the action.

Grant intervened into this acton on April 5, 1994. Grant contends that she was sexually discriminated against and injured when the Defendants wrongfully misinformed the Texas Commission on Law Enforcement Officer Standards and Education (TCLEOSE) that she was no longer mentally fit to perform law enforcement duties. TCLEOSE is a state agency in charge of certification of commissioned law enforcement officers. The Defendants notified TCLEOSE regarding Grant on January 6, 1993, when Officer Henry Womack sent a F-5 Termination Form informing TCLEOSE that Grant was no longer employed with HPD.

The Defendants contend that Texas law mandates that HPD, the sponsoring agency, must notify TCLEOSE when an officer is no longer in its employ. Thus, their notification to TCLEOSE of Grant's change in status was not only permissible but was mandated by law and cannot be considered as a wrongful act. However, if the Defendants provided false information in their notification forms or provided the notification for discriminatory purposes of harassment and retaliation, the notification to TCLEOSE could be considered a wrongful act. In viewing the facts in the light most favorable to Grant, there is a genuine issue of fact as to whether the notification to TCLEOSE that her certification as a law enforcement officer be terminated, this recommendation was in direct conflict with the recommendation of the Department's chosen psychiatrist, and was offered as an attempt to harass and retaliate against her for asserting her rights. Thus, Grant's cause of action under

this claim may have accrued on January 6, 1993. Accordingly, because a genuine issue of material fact remains regarding the timeliness of Grant's claim, the Defendants are not entitled to summary judgment on this claim on statute of limitations grounds.

B. Tortious Interference With Business Relations

Under Texas law, there is a two (2) year statute of limitations for claims for tortious interference with business relations. Arabian Shield Development Company v. Hunt, 808 S.W.2d 577, 583 (Tex. App.-Dallas, 1991 writ.denied). Also, under Texas law, the statute of limitations begin to run when the cause of action accrues. TEX.CIV.PRAC. & REM.CODE ANN. §16.003 (Vernon 1986). Thus, the Court must determine at what point Grant's cause of action accrued. Normally, the cause of action accrues when the plaintiff suffers injury. Arabian, at 583.

The continuing tort theory provides that where the last act alleged occurs within the filing period and is part of an ongoing pattern of discrimination, allegations concerning earlier acts are not timebarred. Hendrix v. Yazoo City, 911 F.2d 1102, 1103 (5th Cir. 1990). Under Texas law, a cause of action for continuing tort does not accrue, until the defendants' tortious conduct ceases. Upjohn Co. v. Freeman, 885 S.W. 2d 538 (Tex.App.-Dallas 1994, writ denied). A continuing violation tolls the statute of limitations because limitation periods are imposed only to prevent stale claims, and where the defendant's conduct constitutes continuing violation, the staleness concern disappears. Havens Realty Corp. V. Coleman, 102 S.Ct.114, 1125 (1982).

As stated previously, Grant intervened into this action on April 5, 1994. Under the continuing tort theory, her cause of action accrued, and the statute of limitations began to run, when the last wrongful act occurred. Grant contends that the ultimate tortious act of the Defendants was misinforming TCLEOSE that she was no longer mentally fit to perform law enforcement duties on January 6, 1993, and their statement to TCLEOSE goes far beyond stating that she was no longer employed because it falsely stated she was no longer competent. The Defendants contend that Grant cannot use this act to establish the date of her cause of action accrued because the act in question was not a wrongful act. Again, the Court concludes that there is a genuine issue of material fact as to whether the Defendants' act was wrongful. Therefore, the Defendants are not entitled to summary judgment on this claim on statute of limitations grounds.

IV. CONCLUSIONS

Based upon the foregoing reasoning, it is therefore

RECOMMENDED that the Defendants' Motion for Summary Judgment (#29) be GRANTED IN PART, and DENIED IN PART. Specifically, it is

RECOMMENDED that the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of tortious interference with business relations be DENIED. It is further

RECOMMENDED that the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of intentional infliction of emotional distress be GRANTED. It

is further

RECOMMENDED that the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of premise liability or negligent failure to maintain a reasonably safe work environment be GRANTED. It is further

RECOMMENDED the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of defamation be GRANTED. It is further

RECOMMENDED the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of intentional or negligent invasion of privacy be GRANTED. It is further

RECOMMENDED the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of negligent hiring, retention, and supervision be GRANTED. It is further

RECOMMENDED the Defendants' Motion for Summary Judgment in regard to the Plaintiffs' claim of civil conspiracy be GRANTED. It is further

RECOMMENDED the Defendants' Motion for Summary Judgment in regard to all of Grant's tort claims be DENIED.

The clerk shall enter this Memorandum and Recommendation and provide all parties with a true copy. The failure to file written objections to the proposed finding(s) and recommendation(s) within ten (10) days of receipt, shall

bar an aggrieved party, except upon grounds of plain error, from attacking the proposed actual findings and legal conclusions on appeal. The prevailing party shall, within ten (10) days of receipt, respond to any objections lodged.

ENTERED at Houston, Texas this 3rd day of March, 1997.

/s/_____
Calvin Botley
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed November 6, 1998]

No. 97-20429

DEBBIE L. BENNINGFIELD, Plaintiff-Appellee,	)	
PEGGY FRANKHOUSER; PAMELA M. GRANT Intervenor Plaintiffs - Appellees,	)	**Order Denying Petition For Rehearing**
v.	)	
THE CITY OF HOUSTON; ET AL. Defendants,	)	
SAM NUCHIA, Chief; RICHARD J. PFEIL; A. WADE RUNNELS; C. O. BRADFORD; ROBERT T. FLEMING; J. R. JONES Defendants - Appellants	)	

Appeal from the United States District Court for the
Southern District of Texas, Houston

ON PETITIONS FOR REHEARING

Before POLITZ, Chief Judge, JONES and DUHE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed by appellants in the above case is DENIED.

IT IS FURTHER ORDERED that the petition for rehearing filed by appellees in the above case is DENIED.

ENTERED FOR THE COURT:

/s/_____
United States Circuit Judge

APPENDIX F

Docket Text

10/16/98	Extension granted by phone until: 10/23/98 to file appellee's pet for regrh for Appellee Pamela M. Grant Appellee Peggy Frankhouser, Appellee Debbie L. Ben [97-20429]

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed October 23, 1998]

No. 97-20429

DEBBIE L. BENNINGFIELD, Plaintiff-Appellee,	)	
PEGGY FRANKHOUSER; PAMELA M. GRANT Intervenor Plaintiffs - Appellees,	)	**Appellees' Petition For Rehearing**
v.	)	
THE CITY OF HOUSTON; ET AL. Defendants,	)	
SAM NUCHIA, Chief; RICHARD J. PFEIL; A. WADE RUNNELS; C. O. BRADFORD; ROBERT T. FLEMING; J. R. JONES Defendants - Appellants	)	

Civil Action No. H-95-5473

Petitioners' Petition for Rehearing (filed 10/23/98)

Appeal from the United States District Court for the
Southern District of Texas, Houston

ORAL ARGUMENT REQUESTED

Joan M. Lucci Bain
Bain & Bain, P.L.L.C.
1535 West Loop South, 4th Floor
Houston, Texas 77027
713/629-6222
713/629-6226 Fax
Attorneys for Plaintiffs-Appellant

Petitioners' Petition for Rehearing (filed 10/23/98)

TABLE OF CONTENTS

Page

STATEMENT OF ISSUES 2

ISSUE NO. 1: THIS COURT'S RESTRICTIVE INTERPRETATION OF ADVERSE EMPLOYMENT ACTION IN A FIRST AMENDMENT CASE IS IN CONFLICT WITH FIFTH CIRCUIT AND SUPREME COURT PRECEDENT 3

ISSUE NO. 2: THIS COURT HAS GONE BEYOND THE SCOPE OF A QUALIFIED IMMUNITY APPEAL BY RESOLVING ISSUE S OF FACT 8

ISSUE NO. 3: THIS COURT'S MISUNDERSTANDING OF THE FACTS CAUSED ERRONEOUS RULINGS 9

A. Grant's First Amendment Claim 9
B. The Benningfield IAD Investigations . . . 11
C. Benningfield's Written Reprimand 13
D. Benningfield's APC Referral 13
E. Defendants' "Delay in Promoting Benningfield. 14
F. The State AFIS Interface Meetings 15
G. Retaliation Against Frankhouser 16
H. A Reasonable Person in Frankhouser's Position Would Have Resigned 17

TABLE OF AUTHORITIES

Cases — *Page*

Click v. Copeland, 970 F.2d 106 (5TH Cir. 1992) . . 4, 5

Dorsett v. Board of Trustees for State Colleges and Universities, 940 F.2d 121 (5th Cir. 1988) 7, 16

Fyfe v. Curlee, 902 F.2d 401 (5th Cir.), *cert. denied*, 111 S. Ct. 346 (1990) 6

Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993) . . . 3

Nerren v. Livingston Police Dept., 86 F.3d 469 (5th Cir. 1996) 8, 11

Oncale v. Sundowner Offshore, Inc., 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) 3

Perry v. Sindermann, 92 S. Ct. 2694 (1972) 5

Pierce v. Texas Dept. of Criminal Justice, Inst. Div., 37 F.3d 1146 (5th Cir. 1994) 5

Reeves v. Claiborne County Bd of Educ., 828 F.2d 1096(5th Cir. 1997) 6

Rutan v. Republican Party of Illinois, 110 S. Ct. 2729 (1990) 4-7

Thompson v. City of Starkville, 90 F.2d 456 (5th Cir. 1990) 4

Vojvodich v. Lopez, 48 F.3d 879 (5th Cir.), *cert. denied*, 116 S. Ct. 169 (1995) 6

EXPLANATION OF RECORD REFERENCES

This panel commented several times that it was unable to locate evidence in the record. The voluminous record made it impossible to fully annotate the briefs, so appellees provided the annotated chronology (App. B) and annotated it to the zip disk (R.E. 2; App. C. here). Appellees apologize if this method caused difficulty. It was intended to enable the Court to move easily through its choice of either the four bound volumes of summary judgment evidence or zip disk. References to (Doc. ___ p.___) are impossible to trace in the hard copy volumes of evidence because all three of the four volumes of deposition excerpts and affidavits were filed as one document, and are referenced by deponent and deposition page and/or exhibit. If the Court is using the record copied onto disk, only the Doc. ___, p. ___) reference will enable the Court to locate the information. Appellees' record excerpts contain the following affidavits:

Affiant	Doc., p.	Appellees' Record Excerpts
Benningfield	Doc. 15, pp. 5-37	3A
Grant	Doc. 15, pp. 38-54	3B
Frankhouser	Doc. 15, pp. 55-60	3C
Wood	Doc. 15, pp. 61-64	3D
Anderson	Doc. 15, pp. 65-73	3F
LeBlanc	Doc. 15, pp. 74-77	3G

STATEMENT OF ISSUES

1. This Court's restrictive definition of adverse employment action in a first amendment claim is in conflict with decisions of the Fifth Circuit and the United States Supreme Court.

2. This Court has gone beyond the scope of a qualified immunity, appeal by resolving issues of fact.

3. This Court's misunderstanding of the facts caused erroneous rulings.

ISSUE NO. 1: THIS COURT'S RESTRICTIVE INTERPRETATION OF ADVERSE EMPLOYMENT ACTION IN A FIRST AMENDMENT CASE IS IN CONFLICT WITH FIFTH CIRCUIT AND SUPREME COURT PRECEDENT.

The panel mistakenly dissected the retaliation claim into subparts and then based its conclusion as to the seriousness of the defendants' conduct (and thus, its assessment of whether that conduct rose to the level of a constitutional violation) on each isolated instance. While a trivial act may not establish constitutional harm, the acts of retaliation against plaintiffs, when viewed in their entirety, exceed any definition of triviality. The previous discussions of this Court and the Supreme Court counsel that a harassment can be properly assessed only by considering the totality of the circumstances.

> We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), *supra,* at 23. In... (all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target .... The real social impact of workplace behavior often depends or. a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical

acts performed.

Oncale v. Sundowner Offshore, Inc., 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

Here, had the only act of retaliation against Grant been refusal to change her shift, a constitutional violation probably would not exist. But Grant lost her license to serve as a law enforcement officer and the opportunity to continue her career with HPD. (See page 9-12 below).

Plaintiffs suffered the kind of reprisals that have been judged unlawful by both this Court and the U.S. Supreme Court. In *Rutan v. Republican Party of Illinois,* 110 S. Ct. 2729 (1990), the Court ruled that a transfer, failure to promote, or failure to recall after layoff, even without pay loss is sufficient to state a first amendment claim. Defendants refusal to allow Grant to resume her career in an existing vacancy is no less punishment than defendants' demotions of Benningfield and Frankhouser. Benningfield, Frankhouser and Grant all gave statements to management review about serious police misconduct and all were denied career opportunities because of it. These are not "trivial" matters. It is serious punishment. The analysis in *Rutan* is consistent with *Click v. Copeland,* 970 F.2d 106, 109 (5th Cir. 1992) (approving first amendment violation where employee showed employer "altered an important condition of employment"): *Wilson v. UTHealth Center,* 973 F.2d 1263, 1270 (5th Cir. 1992) ("Any retaliation for Wilson's speech on a matter of such prominent public concern... represents a violation of a clearly established right.... The cumulative effect of long term harassment should be considered. *Thompson v. City of Starkville,* 90 F.2d 456, 470 (5th Cir. 1990) ("Rather, in light

of the law existing at the time of Thompson's speech, the individual defendants' alleged actions over the following six years were clearly unlawful."). (Doc. 104, p. 53). As *Ruran* pointed out, any significant and improper punishment of an employee for having exercising first amendment rights is unlawful. 110 S. Ct. at 2736.

Neither *Pierce v. Texas Dept. of Criminal Justice, Inst. Div.*, 37 F.3d 1146 (5th Cir. 1994) and *Harrington v. Harris,* 118 F.3d 359 (5th Cir. 1997) relied on by this Court, are interlocutory appeals of immunity. In both cases, the plaintiffs had a full trial. At this stage, the Court should only consider whether the record as a whole establishes the defendants' conduct may have had a chilling effect on the plaintiffs' exercise of their first amendment rights. *Rutan,* 110 S. Ct. at 2734, 2738; Click v. Copeland, 970 F.2d 106, 109 (5th Cir. 1992). Quoting from *Perry v. Sindermann, 92* S. Ct. 2694 (1972), the Court explained:

> if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

110 S. Ct. 2734 (citations omitted). The defendants' denied plaintiffs benefits and opportunities to advance.

The list of adverse actions given in *Pierce* should not be an exclusive list of adverse actions which violate the first amendment. This Court has repeatedly held that a transfer

(even without a loss in compensation) violates the Constitution, if it has a serous detrimental effect on the plaintiff's employment. *See, e.g., Vojvodich v. Lopez,* 48 F.3d 879 (5th Cir,), *cert. denied,* 116 S. Ct. 169 (1995); *Fyfe v. Curlee,* 902 F.2d 401,404 (5th Cir.), *cert. denied,* 111 S. Ct. 346 (1990); *Reeves v. Claiborne County Bd of Educ.,* 828 F.2d 1096 (5th Cir. 1997). This Court's restriction of "adverse employment action" to that list, is contrary to the entire rationale of *Rutan's* majority opinion:

> Respondents next argue that the employment decisions at issue here do not violate the First Amendment because the decisions are not punitive, do not in any way adversely affect the terms of employment, and therefore do not chill the exercise of protected belief and association by public employees. This is not credible. . . . Employees denied transfers to workplaces reasonably close to their homes . . . will feel a daily pressure from their long commutes. . . . And employees who have been laid off may well feel compelled to engage in whatever . . . activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.

Rutan, 110 S. Ct. at 2736. The daily pressure on Grant while being forced to work night shift (11:00 p.m. - 7:00 a.m.), unless she agreed to withdraw her complaint, was no less. Plaintiffs' hold occupations for which the government is [the only] source of employment." *Id.* at 2739. Plaintiffs have a special expertise in a science necessary to police work - finger printing, and in a system used solely by law enforcement

AFIS. Defendants' conduct which caused the revocation of Grant's license deprived her not only of her job, but also of her career. Their exclusion of Benningfield and Frankhouser from state interface prevented them from making important advancements in their profession. The chilling effect of defendants' pattern of intimidation, retaliation, and harassment must be considered in the context of a reasonable police officer subject to a strict code of discipline, with a limited and defined career path. Thus, referral to the APC is significant because it is something a law enforcement officer must disclose on any job application. The dispositive question at the early stage of this proceeding is "whether the government, without sufficient justification, is pressuring employees to discontinue the free exercise of their first amendment rights." *Id.*

While courts have expressed reluctance to get involved in assigning office space to tenured professors, *Dorsett v. Board of Trustees for State Colleges & Universities,* 940 F.2d 121,123-24 (5th Cir. 1991), this is not such a case. Here the highest levels of the police department participated in the cover up of corruption and serious retaliation against truth telling police officers. These officers are/were responsible for the integrity of not only the department's criminal history records, but also for the transmission of accurate criminal records to other law enforcement agencies, including the FBI, the Texas Department of Public Safety, and other Texas police.

ISSUE NO. 2: THIS COURT HAS GONE BEYOND THE SCOPE OF A QUALIFIED IMMUNITY APPEAL BY RESOLVING ISSUES OF FACT.

Review of the district court's denial of qualified immunity is limited to determining "whether these facts state a claim under clearly established law." *Nerren v. Livingston Police Department,* 86 F.3d 469, 472 (5th Cir. 1996). Disputes of fact concerning defendants' motivation for conduct plaintiffs assert is retaliatory, is beyond the jurisdiction of this appeal. *Id.* This Court acknowledged several disputes between the defendants' proffered justification for conduct and the plaintiffs' assertion of retaliation, but resolved these fact issues against plaintiffs.[2] *Nerren* commands that the court "ignore the disputes of fact, take those facts assumed by the district court in light most favorable to [plaintiffs]." *Id.* Furthermore, by considering each instance of retaliatory conduct separately, the Court diverted from the global issue before it, "whether under those facts [plaintiffs] [have] stated a claim under clearly established law." *Id.*

ISSUE NO. 3: THIS COURT'S MISUNDERSTANDING OF THE FACTS CAUSED ERRONEOUS RULINGS.

The panel's opinion (App. A) contains factual errors which impact the outcome. For example, Benningfield never received "back pay." (Op., p. 13). Appellees ask the court to reconsider portions of its decision based on the evidence the Court could not find.

---

[2] *i.e.,* "Grant alleges she was discharged in retaliation. . .; evidence, however, indicates . . . came as a result of independent psychiatric exam" (Op., p. 8); "Benningfield alleges she was referred to the [APC] . . . . The referral was designed to gather facts. . ." (Op., p. 9).

A. **Grant's First Amendment Claim.**

The panel concluded "Grant has failed to establish a causal connection between speech on matters of public concern and the adverse employment actions she alleges . . . described as being "offered a day shift position to withdraw her grievance." (Op. @ 7-8 & n. 1). Grant's first amendment claim is more complex. She also reported criminal history problems to high ranking officials and suffered adverse consequences:

1. Accused of making a bum identification after filing grievance over discriminatory seniority practices. Grant proved the fingerprint cards were tampered with, but still received a written reprimand. (Grant Aff.¶ 1);

2. Reports sexual discrimination and harassment by Morris (Doc. 13, pp. 300-02); after which Runnels assigns her to report to Fleming, knowing that Fleming had abused Grant's daughter. (Grant Aff., ¶ 5). Defendants also prevented Grant from promoting. (Grant Aff., ¶¶ 13, 29)[3];

---

[3] Grant never received back pay for defendants failure to promote her between 1989 and 1991.

3. March 14, 1991 statement to HPD investigators. (Grant Aff., ¶ 8). She was referred to the administrative personnel committee ("APC") five days later. The APC is a disciplinary committee. (Doc. 13, p. 522; Grant Aff., ¶¶ 9, 11);

4. Statement to management review followed by defendants' refusal to allow her to return to work despite openings and recommendation by City's risk management. (Grant Aff., ¶¶ 9-15 & Ex. B-3; Wood Aff., ¶ 2; Doc. 13, pp. 526-28);

5. Defendants cause Grant's injured-on-duty status to expire and with,.old her pay for nearly a year, until she accepts involuntary medical retirement. (Grant Aff., 4 17; Wood Aff., ¶ ¶ 3-5);

6. Grant's husband reports to Nuchia the entire history regarding Grant's breakdown and subsequent attempts to return to duty. (Wood Aff., ¶ 5). Contrary to Jones' recommendations, Nuchia orders Grant relieved of duty for unspecified misconduct.[4]

---

[4] "Relieved-of-Duty" is a disciplinary status distinct from "injured-on-duty" and usually results from severe misconduct. (Grant Aff., ¶ 21; Doc. 13, pp. 859, 864).

(Wood Aff., 44 5-8; Grant Aff., ¶¶ 18-23, 28-30 & Ex. B-4);

7. Grant is reprimanded (IAD complaint sustained) for not having her badge, even though the evidence conclusively established Runnels took it. (Grant Aff., 44 25-26; Doc. 13, pp. 716, 774-75);

8. Grant letter to Nuchia reporting events from August *1991* (Doc. 13, p. 765), but when Grant is certified as fit for duty outside of the HPD, Nuchia reports to TCLEOSE[5] that Grant is unfit for duty as a police officer, causing the revocation of her license. (Grant Aff., ¶ 30 & Doc. 43, p. 63).

These facts demonstrate a deliberate effort to prevent Grant from returning to duty after her protected speech.[6] The evidence is uncontradicted that Grant was released to return to open positions in July 1991, almost eighteen months before her forced retirement. Defendants vetoed her return and instead relieved her of duty under false pretenses. The evidence of defendants' repetitive history of retaliation against Grant and others makes the defendants' motive a fact issue.

---

[5] Texas Commission on Law Enforcement Standards & Education, Texas' licensing agency for law enforcement.

[6] A detailed description of defendants' efforts to prevent Grant from returning to duty is contained in appellees' R.E. 1, pp. 20-28, 42-43.

These maneuvers to prevent her from resuming her career caused her forced retirement. Yet, the panel concludes that Grant's medical discharge "came as a result of an independent psychiatric evaluation," and in so doing, makes a fact finding. This Court is jurisdictionally precluded from resolving fact issues in this qualified immunity appeal. *Nerren v. Livingston Police Dept.*, 86 F.3d at 472.

B. The Benningfield IAD Investigations.

The panel disallowed Benningfield's claim that she "was subjected to an IAD investigation in retaliation for her first amendment activity," which the Court described as an investigation "because she was away without leave for three days." (Op., p. 8 & n. 2). There was no IAD investigation of the "AWOL." Benningfield asked Nuchia to have IAD investigate the "AWOL." but he refused. (Benningfield Aff., ¶ 27; Doc. 13, p. 811).[7]

---

[7] The "AWOL" investigation by her supervisors resulted in her removal from AFIS, a written reprimand, docking of her pay, and lowering of her JPR. (Benningfield Aff., ¶¶ 29-37, 45). Eventually, the Civil Service Commission ruled that the department's investigation of Benningfield's AWOL incident was "totally inadequate, and that the multiple punishment which Benningfield received, especially the removal of her managerial responsibilities in AFIS, smacked of malicious retaliation. (Benningfield Aff., ¶ 46, Aff. A-3, pp. 4-5). This was also IAD's conclusion (Doc. 13, p. 35); yet, Nuchia refused to allow IAD to reopen the matter.

There are two IAD investigations involving Benningfield. The first was initiated when Runnels accused Benningfield of stealing criminal histories after Benningfield filed an IAD complaint against his father. (Benningfield Aff., ¶ 306).

Benningfield filed the second IAD complaint based on the letter she and Frankhouser had previously presented to Nuchia. Nuchia refused to allow IAD to investigate the AWOL. (Benningfield Aff., ¶¶ 39-40). Nuchia interfered with Benningfield's right to have an impartial IAD investigation by ordering IAD NOT to investigate Benningfield's allegations of corruption, criminal history contamination, and retaliation. Nuchia also deprived Benningfield of IAD's protection by vetoing IAD's recommendation that Benningfield be removed from her division during their investigation. (Doc. 13, pp. 20-37; Benningfield Aff., ¶¶ 50-57).

C. **Benningfield's Written Reprimand.**

The panel disallowed the reprimand claim believing it had been removed. (Op., p. 10). The hearing officer ordered that the written reprimand be removed from Benningfield's record, but defendants never removed it. (Benningfield Aff., ¶ 58; Doc. 13, p. 890). Additionally, Benningfield was threatened with discharge or promotional pass over. (Benningfield Aff., ¶ 65).[8]

---

[8] The panel could not locate this evidence. (Op., p. 10).

D. **Benningfield's APC Referral.**

The panel held that Benningfield's "APC referral was not an adverse employment action," but... "was designed to gather facts to form the basis for an employment decision." (Op. at 9). Again, the Court is engaging in impermissible fact finding. The facts surrounding the APC referral raise a fact issue as to retaliatory motive.

The defendants contend that the APC referral was to determine Benningfield's fitness for duty because of the alleged AWOL incident, but she was not referred until February 1993, more than six months after the alleged "AWOL," two months after the Civil Service Commission had ruled in her favor, and fourteen days after she presented evidence of contaminated criminal histories to IAD. IAD recommended Benningfield not be sent to APC. (Benningfield Aff., ¶¶ 49-51; Doc. 13, pp. 20-37). Referral to the APC is disciplinary and causes a permanent mark on an officer's record.

The February 1993 referral order was not enforced until June 1993, one day after Benningfield placed first on a promotional test, and approximately one month after the Civil Service Commission ruled in her favor a second time. (Benningfield Aff., ¶¶ 58-60; Doc. 13, pp. 422, 831, 890). Defendants' year long delay in conducting the APC evaluation belies any urgent need to determine Benningfield's fitness for duty. The evidence that the IAD officer who investigated Benningfield's complaint was removed from IAD and assigned to night patrol after testifying in favor of Benningfield, also suggests the defendants' propensity for retaliation. (Doc. 13, pp. 41-42). Retaliatory motive is a fact

issue.

E. **Defendants' "Delay in Promoting Benningfield."**

Benningfield's failure to promote claim was not addressed based on a misconception that Benningfield received back pay. (Op., p. 13). She did not.[9] The evidence is undisputed that vacancies existed after the 1991 test. (Doc. 13, p. 36869; Doc. 43, pp. 67-78). Defendants prevented Benningfield from promoting by not giving the exam. There is no evidence She received back pay or retroactive seniority. (Grant Aff., ¶¶ 13, 29; Benningfield Aff., ¶¶ 14, 59, 68).

F. **The State AFIS Interface Meetings.**

The panel concludes that preventing attendance at "certain conferences in retaliation for filing grievances," is not an adverse employment action because it "would constitute needless micromanagement." (Op., p. 9). The defendants' refusal to authorize Benningfield's and Frankhouser's attendance at state AFIS interface constituted much more than an "assignment." State interface is a legislatively mandated project organized to design a system that will enable law enforcement agencies to share criminal

---

[9] Perhaps the court's confusion derives from appellant's counsel's concession that when the City fails to give a promotional exam as mandated by state law, the City must give back pay and retroactive seniority to the person entitled to promote. (Appellant's R.E. D, p. 41).

history records statewide. (Doc. 13, p. 352). Benningfield was AFIS manager, and Frankhouser was assigned to oversee the installation and maintenance of the system by Printrak. Benningfield and Frankhouser were the only ones in the department with the expertise to accomplish the state mandate. Despite the state's request that an AFIS operations expert attend, defendants refused to allow either to attend over the protest of HPD's interface design contract representative. (Doc. 13, pp. 352-59,423-25). Compliance with that mandate was Benningfield's responsibility as AFIS manager. Frankhouser was responsible to ensure that any necessary changes to the system were implemented through the Printrak contract. In other words, their presence was necessary to the performance of their duties, and to the department's compliance with the mandate.

State interface is a far cry from the "teaching assignments, administrative matters, and departmental procedures in *Dorsett v. Board of Trustees for State Colleges and Universities,* 940 F.2d 121, 123-24 (5th Cir. 1988) relied on by the panel.

G. **Retaliation Against Frankhouser.**

This Court also disallowed Frankhouser's claim that she was punished by being assigned twice the workload of other employees. (Op., p. 9). Frankhouser carried at least two full-time assignments from 1985 until she left in January 1993. Yet, she was denied overtime pay for carrying out her responsibilities and accused of taking unauthorized vacation when she was in other parts of the department performing

non-latent duties. (Frankhouser Aff., ¶¶ 8, 11, 20).[10]

In early 1990, in addition to her other assignments, Fleming ordered Frankhouser to catch up someone else's one-year backlog. (Doc. 13, p. 320). Approximately one month after Frankhouser gave her statement regarding Marilyn Mokwa, Runnels and Fleming denied Frankhouser overtime for her required travel to Printrak for the final acceptance of the Printrak contract. (Doc. 13, pp. 866-69; Frankhouser Aff., ¶ 11; Benningfield Aff., ¶ 12; Frankhouser Aff., ¶ 5). A week later, Runnels refused to authorize Frankhouser's attendance at yet another state AFIS interface meeting. (Doc. 13, pp. 358,423-25; Benningfield Aff., ¶ 10). After Frankhouser's statements to management review, Fleming wrote scathing letters to the investigators appointed by Chief Watson, claiming Benningfield and Frankhouser had sabotaged the AFIS system. (Doc. 13, pp. 59-61). These were not mere "criticisms," but written allegations of misconduct made to the Chief's representatives to prevent management from believing their reports of misconduct. Fleming's accusations were severe enough to warrant the imposition of discipline, yet, Fleming admitted in his deposition they were unfounded. (Doc. 13, pp. 382-85, 578-98,602-12). They adversely affected Frankhouser's professional reputation and were intended to chill her speech. The timing of the charges, suggest retaliation. While each incident may not rise to the level of adverse employment action, in this case, the physical and emotional toll of being repeatedly subjected to false

---

[10] After promoting to Latents, Frankhouser remains responsible for Printrak's contract, including delivery and maintenance of the AFIS system. (Doc. 13, p. 258).

accusations of misconduct following protected speech, makes the chilling effect more severe.

H. A Reasonable Person in Frankhouser's Position Would Have Resigned.

In October 1992, Frankhouser saw a counselor because she was having emotional and physical effects from stress. (Anderson Aff., Ex. 8; Frankhouser Aff, ¶ 18). During the months between August 1992 and January 1993, plaintiffs tried repeatedly to get management to address the serious problems in ID:

1. August 1992 - Grant's statements to Internal Affairs. (Grant Aff., ¶¶ 25-27; Doc. 13, p. 660);

2. August 10, 1992 - Benningfield letter to Nuchia. (Benningfield Aff., ¶ 27);

3. August 24, 1992 - Grant letter to Nuchia. (Doc. 13, p. 765);

4. Benningfield statement to Assistant Chief Jones. (Benningfield Aff., ¶ 35);

5. Anderson statement to the City's personnel director on behalf of Benningfield and Frankhouser. (Anderson Aff., ¶ 3);

6. Anderson statement to investigator Bell, which Bell promises to report to Nuchia. (Anderson Aff., ¶¶ 3, 5);

7. September 21, 1992 - Benningfield statement to Internal Affairs. (Benningfield Aff., ¶ 39);

8. October 13, 1992 - Benningfield signs Internal Affairs complaint. (Benningfield Aff., ¶ 40; Doc. 13, p. 206);

9. Benningfield statement to Assistant Chief Jones. (Benningfield Aff., ¶ 40) (Jones confirms he has already informed Nuchia);

10. December 1, 1992 - Benningfield and Frankhouser statements to City personnel director and City Risk Management. (Benningfield Aff., ¶ 43, Frankhouser Aff., ¶ 18); and

11. December 2, 1992 - Benningfield, Frankhouser, and Hebert testify before Civil Service Hearing Examiner. (Benningfield Aff., ¶ 44).

Their good faith efforts were rewarded with retaliation from which there seemed to be no protection. During the same period, (1) Grant was subjected to four 48-hour disciplinary notices, referred to the APC Committee, forced to undergo a psychological evaluation, prevented from returning to duty, reported to Child Protective Services, had a charge sustained by IAD; and reported to TCLEOSE as mentally incompetent; (2) Benningfield succumbed to the stress and suffered an emotional breakdown, had her JPR lowered, was docked pay, given a written reprimand, denied an impartial investigation, removed from AFIS, and referred

to the APC; and (3) Frankhouser was denied pay, had her training responsibilities removed, had her JPR lowered, was falsely accused of taking unauthorized vacation, and of using profanity (for which Benningfield had been disciplined). During that fall, Benningfield's Internal Affairs complaint was thwarted by Nuchia; Benningfield and Frankhouser were told by City personnel and risk management representatives that Nuchia and Bradford had refused to listen; defendants refused to follow the civil service examiner's ruling; and Ann Hebert was removed from IAD after testifying for Benningfield.

Since 1991, Frankhouser had witnessed three qualified, experienced officers (Grant, Mokwa, and Benningfield) suffer emotional breakdowns on the job. Frankhouser was suffering from both physical and emotional symptoms of stress. (Frankhouser Aff., ¶ 18). She, like Hebert, had testified in favor of Benningfield at the December 1992 grievance hearing. There was no one left to seek protection from. It was obvious that the City was going to allow the defendants to punish these employees for speaking out. The fact that Benningfield stayed does not make Frankhouser's decision to leave unreasonable. By the time Frankhouser resigned, every female classified officer in the division, except Benningfield, had either resigned or been fired. (Benningfield Aff., ¶ 72). Benningfield survived the gauntlet, but not without injury.

WHEREFORE, plaintiffs pray that this Court reconsider its denial of portions of plaintiffs' first amendment claims, and modify its October 5, 1998 decision to reinstate Grant's first amendment claim, and to remand plaintiffs' first amendment claims for trial without limitation, and that the Court correct the factual errors so they do not restrict the trial

court.

Respectfully submitted,

BAIN & BAIN, P.L.L.C.

/s/_____

Joan M. Lucci Bain
SBN 01548020
Federal I.D. No. 67
1535 West Loop South, 4th Floor
Houston, Texas 77027
713/629-6222
713/629-6226 Fax

ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Appellees' Petition for Rehearing has been served upon the following counsel of record by certified mail, return receipt requested, on this the 22nd day of October, 1998.

Mr. Brian J. Begle
Mr. John J. Hightower
Olson & Olson
Three Allen Center, Suite 3485
333 Clay Street
Houston, Texas 77002

/s/_____
Joan M. Lucci Bain

CERTIFICATE OF COMPLIANCE

(PLACE THIS AS LAST DOCUMENT IN YOUR BRIEF BEFORE THE BACK COVER)

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5Th CIR. R. 32.2.7(b).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS (select one):

   A. 4000 words in proportionally spaced typeface, OR

   B. _____ lines of text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (select one):

   A. in proportionally spaced typeface using: Software Name and Version: WORDPERFECT 8 FOR WINDOWS '95 in (Typeface Name and Font Size):CG TIMES 14 pt., OR

   B. in monospaced (nonproportionally spaced) typeface using: Typeface name and number of characters per inch:

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR

A COPY OF THE WORD OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN 5th CIR. R. 32.2.7, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

/s/_____
Joan Lucci Bain
Signature of filing party

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE BACK COVER)

APPENDIX H

SUMMARY JUDGMENT- TIME LINE - COURTS

1985

May 7, 1985 - Frankhouser, Benningfield and Grant went separately to Chief Brown to report Audra Runnel's discrimination and the contamination of criminal histories and AFIS database. (Benn. Aff., ¶ 3; Frank Aff., ¶ 3).

May 9, 1985 - Benningfield removed from her day shift assignment and assigned to **A. Wade Runnels, Jr.** (Benn. Aff., ¶¶ 3 & 4).

July 8, 1985 - Compliance Inspections show no compliance. (Weaver Ex. 3).

July 11, 1985 - Wade Runnels implements restroom sign out log to monitor and ridicule female employees' restroom usage. (Runnels Vol. I, p. 122).

July 14, 1985 - Benningfield files Internal Affairs ("IAD") complaint against Audra Runnels. (Benn. Aff., ¶¶ 3 & 4).

July 20, 1985 - Frankhouser promoted under Civil Service law to Latent Print Examiner, but ordered to complete specifications and installation for AFIS system. (Runnels Depo., Vol. I, p. 132).

Summary Judgment Timeline ordered by the District Court

August 1985 - Grant gives statement to IAD re: Audra Runnels conduct. (Grant Aff., ¶ 5).

October 18, 1985 - Wade Runnels files IAD complaint accusing **Benningfield** of stealing criminal history records. (Benn. Aff., ¶ 6).

1986

Fall 1986 - Audra Runnels is forced to retire. (Benn. Aff., ¶ 3; Runnels Depo., Vol. II, p. 269).

October 1986 - Grant told **Runnels** that **Fleming** had abused one of her daughters and attempted suicide in front of them. (Grant Aff., ¶ 5).

December 20, 1986 - Wade Runnels becomes Administrator over I.D., knows about **Benningfield's** and **Frankhouser's** complaints. (Runnels Depo., Vol. II, pp. 265,268-271). Runnels tells Larry Williams, "All women belong under your thumb, keep them there." (Anderson Aff., ¶ 5; Nuchia Depo., Vol. II, Ex. 16).

1987

June 8, 1987 - Grant files grievance regarding Runnels discriminatory seniority practices. (Grant Aff., ¶ 5; Runnels Depo., Vol. I, p. 157).

August 18, 1987 - David Hyatt accused **Grant** of making an erroneous identification. **Grant** proved that the

fingerprint card files had been altered. (Grant Aff., ¶ 3; Runnels Depo., Vol. I, pp. 80, 97; Fleming Depo., Vol. I, pp. 163-165).

August 19, 1987 - Runnels ordered Grant to turn in her badge claiming that it was the wrong kind. (Grant Aff., ¶ 25).

October 13, 1987 - Grant told she can go to day shift, and asked to withdraw her grievance. She refused and is not given day shift. (Runnels Depo., p. 67).

October 14, 1987 - Grant's Step 3 grievance hearing. (Runnels Depo., Vol II., p. 160).

October 15, 1987 - Runnels gives **Grant** a written reprimand. (Runnels Depo., Vol. I, p. 96).

1988

August 23, 1988 - Grant filed her second grievance. (Court record -- Doc. 29, p. 65).

1989

1989 - Benningfield ordered to report to **Runnels.** (Benn. Aff., ¶ 20).

May 4, 1989 - Grant reports to **Runnels** sex discrimination, harassment, and retaliation by Morris. (Runnels Depo., Vol. I, p. 145).

May 8, 1989 - Runnels assigns **Grant** to report to

Fleming, contrary to chain of command and knowing that **Fleming** abused **Grant's** daughter. (Grant Aff., ¶ 5).

June 15, 1989 - ID Officer Supervisor exam announced but canceled. Examination was not given until July 16, 1991, when Laszlo Beregszaszy became eligible. (Grant Aff. ¶ 13).

September 16-22, 1989 - **Runnels** requires **Frankhouser** and **Benningfield** to share a hotel room in order to approve their attendance at Printrak conference, but authorizes separate rooms for Zeringue and Morris. (Benn. Depo. ¶ 23; Hebert Ex. 6, p. 03991).

1990

Frankhouser continued dual assignment in the Latent Lab and AFIS, and Fleming orders her to catch up the one year backlog left by Olen Malaer. (Runnels Depo., Vol. I, pp. 135, 170).

September 13, 1990 - Annette Patrick terminated. (Grant Aff., ¶ 3, Runnels Depo., Vol. I, pp. 172-173).

October 11, 1990 - Mike Reynolds, Identification Officer Supervisor makes two (2) erroneous identifications of fingerprints. No disciplinary action is taken. (Grant Aff., ¶ 3; Runnels Depo., Vol. I, pp. 95 & 99; Fleming Depo., Vol. I, pp. 164-165).

November 1990 - Runnels letter to Yorek accusing

Benningfield/ Frankhouser of misconduct and having their own agenda. (Runnels Depo., Vol. II, p. 261).

December 3, 1990 - Yorek met with ID supervisors. **Benningfield/Frankhouser** were not allowed to attend. (Runnels Depo., Vol. II, pp. 261-63).

1991

February 4, 1991 - Fleming tells **Grant** that **Runnels** is going to remove the partitions surrounding Grant's work area. (Grant Aff. ¶ 7).

February 8, 1991 - Runnels orders **Grants** partitions removed. Grant suffered an emotional breakdown witnessed by **Benningfield** and **Frankhouser**. (Grant Aff., ¶ 7).

February 28, 1991 - Grant files Injury on Duty report. (Grant Aff., ¶ 8).

March 7, 1991 - Grant letter to **Fleming,** informing him that she is released to return to work half-days. (Grant Aff., ¶ 11; Benn. Aff. Ex. U-5).

March 14, 1991 - Grant gives sworn statement to David Bell which includes contamination of criminal histories, discrimination and retaliation. (Grant Aff., ¶ 8).

March 19, 1991 - Grant referred to the Administrative Personnel Committee (APC), a disciplinary committee. (Fleming Depo., p. 184; Grant Aff., ¶ 11).

March 20, 1991 - Benningfield/Frankhouser give

statements to David Bell confirming contamination of histories, harassment and retaliation. (Benn. Aff., ¶ 8).

March 25, 1991 - Mokwa letter to Watson via **Runnels** and **Fleming** requesting a leave of absence due to stress in the workplace. (Mokwa Depo., Ex. 2).

March 26, 1991 - Runnels letter to Watson denying Mokwa's request for leave of absence. (Benn. ¶ 2, Ex. G-1; Mokwa Depo., Ex. 2).

March 28, 1991 - Fleming letter to Watson VIA **Runnels** denying Mokwa's request and accusing Mokwa of having her own 'agenda.' (Mokwa Depo., Vol. II, Ex. 2, p. 03767).

April 2, 1991 - APC Chairman, orders **Grant** to undergo psychological testing and evaluation with HPD Consultant, Dr. Michael Cox. (Grant Aff. ¶ 11).

April 10, 1991 - Yorek letter to Watson informing her of Grant's Injury on Duty and reports from other ID employees. (Hebert Depo., Ex. 7, p. 04295).

April 22, 1991 - Benningfield/Frankhouser give statements to Management Review with supporting documents showing contaminated criminal histories. (Benn. Aff., ¶ 4; Grant Aff., ¶ 9).

April 22, 1991 - Larry Williams gives statement to Management Review revealing his own mental breakdown and **Runnels'** statement that all women belong under your thumb. (Anderson Aff., ¶ 5).

Summary Judgment Timeline ordered by the District Court

May 1991 - Runnels and **Fleming** refuse to authorize **Benningfield/Frankhouser's** attendance at State AFIS interface meeting. (Benn. Aff., ¶ 10).

May 10, 1991 - Fleming letter to Sgts. Weaver and Harness accusing Benningfield of threatening and demeaning supervisors and personnel over AFIS Issues and complaining about **Benningfield's** work. (Weaver Ex. 5; Fleming. Depo., Vol. I, Ex. 3).

May 15, 1991 - Fleming writes to Weaver and Harness making accusations against Frankhouser. (Weaver Ex. 6; Fleming Depo., Vol. I, Ex. 3).

May 16, 1991 - Fleming letter to Weaver and Harness accusing **Benningfield/Frankhouser** of sabotaging AFIS. (Weaver Ex. 7; Fleming Vol. I, Ex. 4).

May 16, 1991 - Fleming tells Printrak Engineer that **Benningfield** is "not in their future plans for AFIS," damaging **Benningfield's** position on the international AFIS Users Group Executive Committee. (Benn. Aff., ¶ 11).

May 19, 1991 - Civil Service announcement for the ID Officer Supervisor exam. (Grant Aff., ¶ 48).

May 21, 1991 - Frankhouser investigated for allegedly taking unauthorized vacation. (Frank Aff., ¶ 8).

June 18, 1991 - Management Review by Sgts. Weaver and Harness, indicates disparate treatment of personnel and an attitude towards contaminated criminal histories that is "uninterested at best." (Weaver Ex. 3; Benn. Aff. Ex. G-4, p.

03857, 03859; Hebert Ex. 7, pp. 04300-36).

June 21, 1991 - Letter from Mokwa to Watson VIA **Fleming, Runnels, Camp, and Yorek** asking for a leave of absence. (Mokwa Depo., Vol. II, Ex. 3, p. 03749).

June 24, 1991 - Management Review results sent to Chief. (Hebert, Ex. 7, pp. 04296-99; Weaver Ex. 3).

June 27, 1991 - Fleming letter to Watson VIA **Runnels** and **Bradford** recommending Mokwa's request for leave of absence be denied. (Mokwa Depo., Vol. II, Ex. 3).

July 2, 1991 - Mokwa leaves work after confrontation with Runnels. (Mokwa Depo., Ex. 5).

July 16, 1991 - ID Officer Supervisor exam. Laszlo Beregszaszy places first, **Grant** places second. No other candidates pass, leaving vacancies. (Grant Aff., ¶ 3).

July 17, 1991 - Grant goes to **Bradford** to ask to be assigned to the vacancy in the Crime Lab so she can return to duty. (Grant Aff., ¶ 12).

August 1991 - Fleming and Runnels refuse to approve **Benningfield's** attendance at State AFIS Interface meeting. (Bradford Depo., Vol. II, pp. 244-48; Runnels Depo., Vol. II, p. 221).

August 1, 1991 - Grant letter and release to **Bradford** informing him that she can return to duty, "if in a different division." (Bradford Depo., Vol. II, pp. 182-184 & Ex. 4).

Summary Judgment Timeline ordered by the District Court

August 1991 - Weaver tells **Grant** "they" are looking for an assignment Jn the Crime Lab, the Police Academy, or City Legal. (Grant Aff., ¶ 14).

August 1991 - City of Houston Risk Management team recommends that Grant be assigned to the Police Academy. (Fleming Depo., Vol. I, pp. 194-195; Wood Aff., ¶ 2; Grant Aff., ¶ 14; Grant Ex. B-3).

August 1991 - Bradford vetoes risk management's recommendation, and tells **Runnels** and **Fleming** that "he" is going to reconvene the "Paul Clark group," and that "he" will handle **Grant. Bradford** tries to have **Grant's** Injury on Duty reversed. (Bradford Depo., Vol. I, pp. 59-79; Grant Aff. Ex. B-3).

August 30, 1991 - I.D. Officer Supervisor Marilyn Mokwa filed an stress related Injury on Duty report for the July 2, 1991 incident. (Mokwa Depo., Ex. 5).

September 1991 - **Benningfield/Frankhouser** give statement to Attorney Diana Ball, assigned to investigate Mokwa's claim, Both report criminal history contamination, discrimination and retaliation by **Runnels, Fleming,** and **Bradford.** (Benn. Aff., ¶ 12; Frankhouser Aff., ¶ 5).

September 5, 1991 - **Fleming** orders **Benningfield** to perform AFIS training on night shift. (Benn. Aff., ¶ 15; Benn. Aff. Ex. U-6).

September 27, 1991 - **Runnels** and **Fleming** VIA **Bradford** deny Mokwa's request to extend her leave. (Benn. Aff., ¶ G-3,Doc # 03736; Benn. Aff., ¶ 13).

October 8, 1991 - Bradford refuses to accept the findings of the Management Review and conducts his own "investigation." (Bradford Depo., Vol. I, p. 42, 57-79; Vol. II p. 258-260).

October 11, 1991 - Bradford's work group sessions. (Weaver Depo., Ex. 8).

November 8, 1991 - Runnels/Fleming deny **Frankhouser** request for overtime and travel to Printrak. (Bradford Depo. Ex. 1, p. 04723).

November 13, 1991 - Zeringue asks **Runnels** to allow **Benningfield/Frankhouser** to assist him in the State AFIS Interface project. Runnels refuses. (Runnels Depo., Vol. II, pp. 217, 221-22, 224-35, Ex. 2; Benn. Aff., ¶ 10).

November 15, 1991 - Zeringue letter to **Runnels** stating that **Runnels** does not want to provide the level of support required for the successful implementation of the AFIS interface, based on **Runnels** insistence that Barry McDermott (who has no AFIS experience) attend such "a high profile project." (Runnels Depo., Vol. II pp. 217-35, Ex. 3; Hebert Ex. 6, p. 04167).

December 11, 1991 - Zeringue letter to **Bradford** reporting Runnels refusal to allow **Benningfield/Frankhouser** to participate in the State AFIS Interface meetings. (Runnels Ex. 4; Hebert Ex. 6, p. 03989).

December 16, 1991 - Zeringue letter to **Bradford** explaining need for **Benningfield/Frankhouser** to assist him in state AFIS Interface. Bradford denies. (Runnels Ex. 5;

Hebert Ex. 6, p. 04167).

December 1991 - Fleming denies **Frankhouser's** request to take a seminar. (Frankhouser Aff., ¶ 7).

1992

January 10, 1992 - Benningfield/Frankhouser letter to Chief Watson via **Runnels** and **Bradford** requesting meeting to discuss the Health and Welfare of the Identification employees. (Benn. Aff ¶ 16).

January 25, 1992 - Bradford taunts **Benningfield/Frankhouser** to mock their complaints - witnessed by Norbert LeBlanc. (Benn. Aff., ¶ 16; Frankhouser Aff., ¶ 9; LeBlanc Aff., ¶ 2).

Late January 1992 - Runnels discussed **Frankhouser** request for Printrak overtime with Bradford. (Bradford Ex. 1, p. 04724).

February 5, 1992 - Frankhouser request for Printrak special duty OT is denied. (Bradford Ex. 1, p. 04724).

February 7,1992 - Benningfield/Frankhouser meet with Chief Watson and Bradford and present their letter, "Health and Welfare of the Identification Division and Its Employees." (Benn. Aff., ¶ 16; Frankhouser Aff., ¶ 9; Nuchia Depo. Ex. 1).

March 2, 1992 - Frankhouser files grievance to recoup her overtime for trip to Printrak in December 1991. (Bradford Depo. Ex. 1, p. 04730).

March 2, 1992 - Benningfield/Frankhouser send cover letter with copy of their "Health and Welfare letter" to newly appointed **Police Chief Nuchia.** (Nuchia Depo., Vol. II, p. 82 & Ex. 1).

March 16, 1992 - Runnels meets with **Benningfield/Frankhouser** re: **Bradford's** response. Both report response inadequate because it failed to address the serious problems with erroneous criminal histories. (Benn. Aff., ¶ 17, Frankhouser Aff., ¶ 13).

March 1992 - Fleming lowers **Frankhouser's** JPR claiming that she had been disruptive during the management review, and that she had use profanity against **Bradford.** (Frankhouser Aff., ¶ 12).

March 1992 - LeBlanc reports the incident between **Benningfield/Frankhouser** and **Bradford** to **Fleming.** (LeBlanc Aff., ¶ 4).

March 1992 - Fleming lowers LeBlanc's JPR. (LeBlanc Aff., ¶ 4).

March 1992 - LeBlanc reports the incident between **Bradford** and **Benningfield/Frankhouser** and **Fleming's** lowering of his JPR to Nuchia. (LeBlanc Aff., ¶ 6; Nuchia Depo., Vol. I, pp. 51-52).

March 18, 1992 - Benningfield/Frankhouser send letter ordered by **Nuchia** to **Bradford**. (Benn. Aff., ¶ 18; Frankhouser Aff., ¶ 13; Nuchia Ex. 2).

March 31, 1992 - Nuchia orders Runnels to raise

LeBlanc's JPR to 30, the highest possible score. (Runnels, Vol. II, p.206).

April 1992 - Terry Wood letter to **Nuchia** requesting a meeting to discuss **Grant**, and summarizing history from ,February 1991. (Wood ¶ 5).

April 24, 1992 - Sgt. Martin of Chief Nuchia's office tells Wood that **Jones** has been assigned acting Assistant Chief over Technical Services Command today (April 24th) and that Jones was given 5 days to solve **Grant's** issue. (Wood Aff., ¶ 5).

April 24, 1992 - Nuchia letter to **Bradford** asking Bradford to provide a summary of **Grant's** case. (Wood Aff., ¶ 6).

May 14, 1992 - Wood meets with **Jones.** Reports the investigation by David Bell and the investigation and tapes made by Weaver. (Wood ¶ 7).

May 21, 1992 - Grant meets with **Jones** and gives him the letters requesting an extension of the Injury on Duty status and her a proposed solution (reassignment to crime lab). **Grant** tells **Jones** that she is eligible for promotion and that a male, Michael Wright (a Class A Officer), is assigned to the Identification Division. (Grant Aff., ¶ 18, Grant Aff. Ex. B-4).

May 22, 1992 - Jones letter to **Nuchia** recommending extension of **Grant's** Injury on Duty status. (Nuchia Vol. II, Ex. 4).

June 5, 1992 - Nuchia letter to Assistant Chief Shane

ordering that **Grant** be relieved of duty. (Nuchia Depo., Vol. II, pp. 88-89; Ex. 3).

June 5, 1992 - Wood calls **Nuchia's** office to meet with **Nuchia, Jones** and **Bradford. Nuchia** orders Wood to stay out of **Grant's** situation. (Wood Aff., ¶ 8).

June 10, 1992 - Officer Matt Perales tells **Grant** the extension of her Injury on Duty status has been approved and is going to City Council for final approval. (Grant Aff., ¶ 19).

June 10, 1992 - Lt. Kelly Smith telephones **Grant** at 10:10 p.m. and orders Grant to report to Internal Affairs at 9:00 a.m. tomorrow to be Relieved of Duty. (Grant Aff., ¶ 19).

June 11, 1992 - **Grant** admitted to Cypress-Fairbanks Hospital at 3:00 a.m. due to attempted suicide (prescription drug overdose). IAD attempts to force her way into ER to relieve **Grant** of duty. (Grant Aff., ¶ 20; Nuchia Depo., Vol. II, Ex. 5, pp.00014-00015).

June 16, 1992 - Grant meets Smith at HPOA attorney Jan Rich's office to be officially relieved of duty. Smith presents **Grant** with a letter stating **Grant** is being relieved of duty for unspecified misconduct, which **Grant** refuses to sign. (Grant Aff., ¶ 23).

June 16, 1992 - Jones orders **Grant** to report to Dr. Cox. (Grant Aff., ¶ 28).

June 17, 1992 - Jones and **Bradford** meet with

classified B & C Officers. **Jones** tells attendees to address problems through the chain of command. **Runnels** offers to send **Jones** a copy of **Benningfield/Frankhouser's** "Health and Welfare" letter. **Runnels** should not have had a copy. (Benn. Aff., ¶ 21; Frank ¶ 14).

June 22, 1992 - Grant's psychological evaluation by Dr. Cox reveals **Fleming's** sexual abuse of her daughter in early 1980's and his attempted suicide. (Grant Aff., ¶ 5).

June 1992 - HPD reports **Grant** to Harris County Children's Protective Services as "unfit" mother for failing to report **Fleming's** abuse. No action is taken against Fleming. (Grant Aff. ¶ 5).

June 29, 1992 - Grant receives 48-hour notice from Internal Affairs regarding her badge. (Grant Aff., ¶ 25).

July 1, 1992 - Jones, Bradford and **Nuchia** meet with Class B & C personnel. **Benningfield** reports ID Officer Supervisor test not being given. **Nuchia** says he'll abolish the position. (Benn. Aff. ¶ 22).

July 1992 - Runnels refuses to approve **Benningfield/Frankhouser's** attendance at the Printrak Conference unless they agree to share a room. Others were not required to share hotel rooms. (Benn. Aff. ¶ 23).

July 27, 1992 - Benningfield speaks with department psychologist about the discriminatory and retaliatory practices. (Benn. Aff., ¶ 24).

August 3, 1992 - Benningfield calls in sick due to an

upper respiratory infection. (Benn. Aff. ¶ 25).

August 4, 1992 - Benningfield leaves work distraught after verbal exchange with co-workers and fails to call in August 5th and 6th. (Benn. Aff., ¶ 25).

August 5, 1992 - Harry Hope tells **Runnels** that **Benningfield** has been seeing a psychologist and that he believes **Benningfield** may have checked into a private hospital. (Runnels Depo., Vol. III, pp. 304-05; Nuchia Ex. 6).

August 6, 1992 - Runnels' memo to **Nuchia** via **Jones** relaying Hope's statements. (Runnels Depo. Ex. 10; Nuchia Depo. Ex. 6).

August 6, 1992 - Runnels, with the approval of **Nuchia** and **Jones,** files a missing persons report on **Benningfield** and reports her AWOL. (Runnels Depo., Vol. III, p. 304, Ex. 10; Nuchia Depo., Vol. II, pp. 97-98, Ex. 6; Benn. Aff., ¶ 26).

August 6, 1992 - Another 48-hour notice to **Grant** from Internal Affairs, ordering her to submit medical records from Cypress-Fairbanks Hospital. (Grant Aff., ¶ 27; Nuchia Depo., Vol. II, p. 95, Ex. 5).

August 10, 1992 - Benningfield letter to **Nuchia** through **Runnels** and **Jones** explaining what led to her alleged AWOL and requesting that Internal Affairs investigate the incident instead of **Jones**. (Nuchia Depo., Vol. II, pp. 98-99; Runnels Depo., Vol. III, Ex. 13; Weaver Ex. 13; Benn. Aff., ¶ 27).

Summary Judgment Timeline ordered by the District Court

August 11, 1992 - Runnels removes **Benningfield** as AFIS Manager. (Runnels Depo., Vol I, pp. 136-37; Runnels Depo., Vol. II, 250-51; Pfeil Depo. pp. 97, 101, 104-07, Ex. 3; Benn. Aff., ¶ 29).

August 12, 1992 - Runnels letter to **Nuchia** via **Jones** referring **Benningfield** to the Employee Concerns Committee. (Runnels Depo., Vol. III, pp. 299-300, Ex. 10).

August 14, 1992 - Nuchia tells Ms. Rich and Mr. Elder that he plans to. discipline **Benningfield** and that **Grant** and Mokwa are non-credible. (Elder Aff., ¶ 3; Benn. Aff., ¶ 31).

August 17, 1992 - Runnels letter to **Nuchia** via **Jones** regarding **Benningfield's** "AWOL."(Runnels Depo., Vol. II, pp. 207-209; Hebert Ex. 6, p. 04037).

August 21, 1992 - IAD's 3rd 48-hour notice to **Grant**. (Nuchia Depo., Vol. II, pp. 94-97, Ex. 5).

August 24, 1992 - Grant letter to **Nuchia** detailing events from 08/91. (Nuchia Depo., Vol. II, Ex. 5, p. 00014).

August 31, 1992 - With **Fleming's** and **Runnels'** approval, Pfeil orders **Benningfield** to train him on AFIS. (Benn. Aff., ¶ 32; Hebert Ex. 6, p. 04040-41).

Fall, 1992 - Benningfield sees Dr. Anderson for work related stress. (Dr. Anderson Aff., ¶ 2).

September 1992 - Fleming removes **Frankhouser** from training police cadets. (Frankhouser Aff., ¶ 12; Fleming

Depo., Vol. II, pp. 338-42 & Ex. 5).

September 3, 1992 - HPOA attorney asks **Jones** to reassign **Benningfield. Jones** refuses, saying it's **Nuchia's** call. (Benn. Aff., ¶ 35).

September 4, 1992 - IAD issues 4th 48-hour notice to **Grant** ordering her to appear before the APC Committee on September 9, 1992. (Nuchia Depo., Vol. II, Ex. 5; Doc. 00033-34).

September 5, 1992 - Runnels and **Fleming** lower **Benningfield's** JPR. (Benn. Aff., ¶ 35).

September 11, 1992 - Pfeil recommends **Benningfield's** discipline for AWOL. (Pfeil Depo., Ex. 3).

September 15, 1992 - Bradford letter to **Nuchia** stating that Dr. Cox's psychological evaluation of **Grant** confirms work related Post Traumatic Stress Disorder. (Grant Aff., ¶ 28).

September 16, 1992 - Benningfield letter re: "Troubleshooting," **Pfeil** holding her accountable for AFIS downtime, but not informing her of problems. (Benn. ¶ 33).

September 1992 - Pfeil removes **Benningfield** as contact person for Printrak, and listens to her phone conversations. **Pfeil, Runnels** and **Fleming** also open mail addressed to her. (Benn. Aff., ¶ 33).

September 18, 1992 - Dr. Anderson speaks with Stephanie Burks, **City of Houston** Personnel Director, who

admits the **City** is aware of the problems and refers Dr. Anderson to David Bell. (Anderson Aff., ¶ 3).

September 21, 1992 - Dr. Anderson meets with David Bell. (Anderson ¶ 3).

September 21, 1992 - Benningfield asks Captain Holland and Lt. Coleman of IAD to investigate the alleged AWOL instead of **Jones**. **Benningfield** gives Holland a copy of the **Benningfield/Frankhouser** "Health and Welfare" letter. (Benn. Aff., ¶ 39).

September 22, 1992 - **Nuchia** letter to **Benningfield** denying her request that Internal Affairs handle the AWOL investigation. (Nuchia Depo., Vol. II, p. 98; Ex. 11).

September 23, 1992 - **Nuchia** letter to Assistant Chief Contreras and Captain Chandler, stating **Grant** is no longer capable of performing her job. (Nuchia Depo., Vol. II, Ex. 12).

October 1992 - **Frankhouser** sees Dr. Anderson. (Anderson ¶ 8).

October 12, 1992 - FPI Larry Williams letter to Dr. Anderson confirming statement made by **Runnels,** "All women belong under your thumb." (Anderson Aff., ¶ 5; Nuchia Depo., Ex. 16).

October 13, 1992 - **Benningfield** files Internal Affairs complaint and asks to be removed from the I.D. while it is investigated. (Benn. Aff., ¶ 40; Hebert Ex. 10).

Summary Judgment Timeline ordered by the District Court

October 13, 1992 - Benningfield's IAD complaint assigned to Hebert, who is on medical leave. (Hebert Depo. P. 16; Benn. Aff., ¶ 42).

October 14, 1992 - Benningfield and HPOA attorney Jan Rich meet with **Pfeil** and **Jones** regarding **Jones'** recommended discipline. **Jones** tells **Benningfield** he has already spoken with **Nuchia** about **Benningfield's** EEOC complaint. (Benn. Aff. Ex. U-7; Benn. Aff., ¶ 40).

October 15, 1992 - Jones sustains IAD complaint against **Grant** for failure to turn in badge despite evidence that **Runnels** took it. (Nuchia Vol. II Ex. 5, pp. 00002, 00023-24).

October 28, 1992 - The Administrative Disciplinary Committee recommends to **Nuchia** that the City's Affirmative Action review the **Benningfield** AWOL. **Nuchia** imposes discipline, but does not forward to the City's Affirmative Action Committee. (Nuchia Depo., Vol. II, pp. 102-103, Ex. 13; Benn. Aff., ¶ 41).

November 6, 1992 - David Bell tells Dr. Anderson he is going to Chief **Nuchia** and **HPD** Attorney Craig Ferrell, to report the abusive environment in I.D. (Anderson Aff., ¶ 5).

December 1, 1992 - Benningfield/Frankhouser meet with **City** Personnel Director Stephanie Burks and Laura Peters from Risk Management. **Both** report the retaliation. Ms. Burks agrees to meet with Chief **Nuchia.** (Benn. Aff., ¶ 43; Frankhouser Aff., ¶ 18).

December 4, 1992 - Benningfield's Civil Service

Hearing regarding the lowering of her JPR. (Benn. Aff., ¶ 44).

December 14, 1992 - Benningfield receives written reprimand from **Nuchia** for the AWOL incident and use of profanity. (Benn. Aff., ¶ 45).

December 31, 1992 - L. Dillard, Hearing Examiner, issues opinion on JPR Grievance stating **Benningfield** has been subjected to multiple instances of punishment for one incident, further questioning the Department's totally inadequate AWOL investigation. She also questions the abolishment of **Benningfield's** title as possible malicious retaliation. (Benn. Aff., ¶ 46, Attachment A-3).

1993

January, 1993 - Frankhouser meets with **Nuchia** and resigns. **Nuchia** admits to knowledge of "incestuous relationships" in ID. (Frankhouser Aff., ¶ 20, 21).

January 6, 1993 - Nuchia notifies TCLEOSE that **Grant** is not fit for duty despite Form L3 signed by Dr. Cox, on which he certifies Grant is fit for license at any agency other than **HPD.** (Grant Aff., ¶ 30, Ex. U-3).

January 8, 1993 - Benningfield files grievance over the AWOL written reprimand. (Runnels Vol. I, p. 137).

February 9, 1993 - Fleming places Supervisor's Critique in **Frankhouser's** personnel file which states that she is not liked or respected. (Fleming Depo., Ex. 6).

Summary Judgment Timeline ordered by the District Court

February 9, 1993 - Benningfield meets with Sgt. Hebert (IAD) and shows contaminated history evidence. (Benn. Aff., ¶ 49).

February 1993 - Hebert requests assistance to investigate **Benningfield's** complaint -- denied. (Hebert Depo. pp. 43-44).

February 1993 - Nuchia orders IAD not to investigate criminal history and retaliation portions of **Benningfield's** complaint. (Hebert Depo., pp. 46-47, 49-51).

February 16, 1993 - Benningfield meets with Hebert. Hebert tells **Benningfield** to report to IAD until further notice since she did not feel it was safe for **Benningfield** to return to the I.D. (Hebert Depo. p. 82; Benn. Aff. ¶ 50).

February 16, 1993 - Captain Holland, Lt. Huhn and Sgt. Hebert (IAD) with Assistant Chief Kendrick, Chief Nuchia and **HPD** Attorney Craig Ferrell. Hebert reports the substance of **Benningfield's** complaint, the improper AWOL investigation by **Jones**, the Civil Service Hearing Examiner's findings of retaliation, and the contaminated criminal histories. Ferrell suggests **Benningfield** be referred to Administrative Personnel Concerns (APC) Committee for psychological examination. Hebert says referral is retaliation. All agree **NOT** to place **Benningfield** in the APC Committee and that **Benningfield** should be removed from ID during the IAD Investigation. (Hebert Depo. pp. 53-57).

February 22, 1993 - Kendrick meets with **Jones** and **Nuchia** regarding IAD's recommendation. They deny **Benningfield's** request for reassignment and order her to

APC. (Hebert Depo., pp. 61-62; Jones Depo. p. 109-110).

February 23, 1993 - **Nuchia** issues a Circular making discrimination and/or promotional pass-over non-grievable. (Benn. Aff., ¶ 51, Ex. 2).

February 25, 1993 - **Benningfield** notified she is being referred to the APC Committee and ordered back to ID. **Nuchia** and **Jones** know that the APC Committee is chaired by **Bradford. Benningfield** presents written request to Holland to be removed from ID. Holland instructs her to ask **Jones.** (Benn. Aff., ¶ 51; Hebert Ex. 8).

March 10, 1993 - Hebert tells **Benningfield** that her investigation has been limited by **Nuchia** so that it is likely to end up not sustained, that the alleged AWOL issue will not be re-opened, and that the disparate treatment issues were not to be investigated. (Benn. Aff., ¶ 52).

March 15, 1993 - **Benningfield** meets with **Jones**, who denies **Benningfield's** second request for a temporary re-assignment and orders her back to ID. **Jones** states that it is **Nuchia's** decision. (Benn. Aff., ¶ 53; Jones Depo., pp. 109-10).

March 29, 1993 - **Benningfield** letter to IAD Captain Holland asking why disparate treatment and retaliation issues not being investigated and citing ongoing examples. Hebert states that **Nuchia** ordered her not to address certain issues in **Benningfield's** complaint. (Benn. Aff., ¶ 54; Hebert Depo., Ex. 13, 14 & pp. 10203).

April 10, 1993 - 180th day deadline to impose

discipline on **Runnels** based on **Benningfield's** IAD complaint. (Nuchia Depo. pp. 78, 80).

April 12, 1993 - Benningfield's immediate supervisor, ID Officer J. D. Werner, tells her to be very careful because **Runnels, Fleming** and **Pfeil** are out to get her. (Benn. Aff, ¶ 57).

April 19, 1993 - Hebert tells **Benningfield** that she has been ordered not to investigate the "disparate treatment" complaints. (Benn. Aff., ¶ 54).

May 4, 1993 - Civil Service Hearing on **Benningfield's** grievance over written reprimand for "AWOL" and use of profanity. Hebert testifies. (Benn. Aff., ¶ 58; Hebert Depo., pp. 109-10, 113-15).

May 1993 - Hebert is involuntarily transferred out of Internal Affairs assigned night shift patrol. (Hebert Depo., pp. 109-10, 113-15).

May 18, 1993 - Frankhouser files EEOC charge. (Frank Aff., ¶ 22).

May 18, 1993 - Hearing Examiner rules in **Benningfield's** favor and orders **HPD** and **City** to remove **Nuchia's** written reprimand from Benningfield's file. The written reprimand has never been removed. (Bradford Depo. Ex. 5; Benn. Aff., ¶ 57).

June 10, 1993 - Benningfield places first on ID Officer Supervisor test. (Benn. Aff., ¶ 59; Nuchia Depo., Vol. II, Ex. 17).

Summary Judgment Timeline ordered by the District Court

June 11, 1993 - Bradford letter instructing **Benningfield** to report to the APC Committee. **Runnels** gives this letter to **Pfeil, Fleming** and Werner. (Benn. Aff., ¶¶ 59, 60; Runnels Ex. 1).

June 17, 1993 - Grant files EEOC charge. (Grant Aff., ¶ 31).

June 24, 1993 - Benningfield meets with APC Committee chaired by **Bradford**, and is ordered to submit to Psychological Evaluation. **Bradford, Jones,** served on this committee. **Bradford** tells **Benningfield** that if she will say she is not under stress, that he will not recommend her to the APC. **Benningfield** states she is under an extreme amount of stress because of the harassment, retaliation and discriminatory practices by **Runnels, Fleming** and **Pfeil** and that **Bradford, Jones** and **Nuchia** have allowed and participated in those practices. **Bradford** cuts her off. (Benn. Aff., ¶ 60; Bradford Depo., Ex. 5).

June 25, 1993 - Benningfield places first on Latent Print Examiner test. (Benn. Aff., ¶ 61).

June 28,1993 - Benningfield's second letter to **Runnels/Fleming** requesting reinstatement as AFIS Manager. **Runnels** and **Fleming** deny her request and tell her she will be assigned an evening or night shift if she promotes. (Benn. Aff., ¶ 62; Runnels Depo., Ex. 6).

July 2, 1993 - Benningfield notifies **Bradford** that Dr. Anderson will perform the required Psychological Examination and requests that the Committee put in writing the allegations that placed her before APC. **Bradford** refuses.

(Benn. Aff., ¶ 63).

July 6, 1993 - Dr. Anderson calls **Bradford** to ask about the allegations against **Benningfield** and the type of tests **HPD** wants. **Bradford** tells Dr. Anderson that **Benningfield** has outbursts, breaks down in meetings, and has lied. (Anderson Aff., ¶ ¶ 4 & 7).

July 14, 1993 - **Pfeil** removes **Benningfield's** file cabinet containing evidence of contaminated histories and personal belongings from a secured area to an unsecured area. (Benn. Aff., 4 64).

July 21, 1993 - **Nuchia** orders **Benningfield** to his office on July 26th to discuss the passover of her promotion. (Benn. Aff., 4 64; Nuchia Vol. II, Ex. 19).

July 22, 1993 - **Nuchia** tells **Bradford** that **Benningfield** is suicidal. **Bradford** reports to APC and Dr. Anderson. (Anderson Aff., 4 6; Nuchia Depo., Ex. 20).

July 23, 1993 - Dr. Anderson performs the psychological examination on **Benningfield.** (Anderson Aff., 4 7).

July 23, 1993 - The Civil Service Commission rules in **Benningfield's** favor on the written reprimand. (Benn. Aff., 4 66).

July 26, 1993 - Dr. Anderson speaks with Sgt. Elder, and he denies ever saying **Benningfield** is suicidal. (Anderson Aff., ¶ 6; Nuchia Depo., Ex. 20).

Summary Judgment Timeline ordered by the District Court

July 26, 1993 - Benningfield reports to **Nuchia** as ordered, but with counsel. **Nuchia** tells Benningfield that her failure to comply with the ordered psychological examination is jeopardizing her promotion and her employment with **HPD**. Meeting ends with heated discussion between **Nuchia** and counsel. (Benn. Aff., ¶ 65).

July 28, 1993 - Dr. Anderson faxes to **Nuchia** the results of the psychological examination showing **Benningfield** fit for duty. (Anderson Aff., ¶ 7; Ex. E-1).

August 9, 1993 - Nuchia orders **Benningfield** to report to his office, and tells her he will allow her to be promoted, but that "**Runnels** has rights too." (Benn. Aff., ¶ 66).

August 13, 1993 - Benningfield is promoted to Latent Print Examiner. (Benn. Aff., ¶ 67).

August 13, 1993 - HPD gives another test for ID officer SV since **Benningfield** promoted to Latents. Larry Williams, who failed the June test, passes with minimum score and is allowed to promote and retain his day shift central voice print assignment because of "special" expertise. (Benn. Aff., ¶ 68).

August 1993 - Fleming tries to reassign **Benningfield's** direct phone number so he can monitor her calls; repeatedly intercepts her calls. **Fleming** will not permit co-workers to help **Benningfield** move her furniture and belongings. (Benn. Aff., ¶ 67).

August 27, 1993 - Benningfield files suit. (Benn.

Aff., ¶ 69).

October 12, 1993 - Hebert Unsigned investigation report to **Nuchia**. Hebert is ordered to change the report. She complies, but all of the supporting documentation from **Benningfield** is later removed without her knowledge. (Hebert Depo., pp. 22-29; Nuchia Vol. II, Ex.15).

November 1993 - Fleming orders **Benningfield** not to ask to attend training schools. (Benn. Aff., ¶ 70).

November 1993-Current - **Fleming** has repeatedly authorized other Latent Examiners, to exceed the limit of overtime hours, but restricts **Benningfield** to the imposed limit. (Benn. Aff., ¶ 70).

December 3, 1993 - Printrak Executive Users Group Committee Chairman asks Benningfield to serve on committee. **Runnels** and **Fleming** deny her request. (Benn. Aff., ¶ 70).

1994

April 5, 1994 - Frankhouser and Grant file suit. (Grant Aff., ¶ 22).

December 21, 1994 - Runnels assigns **Benningfield** to eliminate the backlog to June 1993, left by Walter Stairhime, which she accomplishes within 6 months. (Benn. Aff., ¶ 70).

APPENDIX I

TABLE OF CONTENTS TO
PLAINTIFFS' SUMMARY JUDGMENT EVIDENCE

TAB

Affidavit of Debbie Benningfield (with attachments) (Doc. 15, p. 5) . . . . . A

Exhibit A-1 (Doc. 15, p. 19)
Exhibit A-2 (Doc. 15, p. 21)
Exhibit A-3 (Doc. 15, p. 22)
Exhibit A4 (Doc. 15, p. 29)

Affidavit of Pamela Grant (with attachments) (Doc. 15, p. 38) . . . . . B

Exhibit B-1 (Doc. 15, p. 45)
Exhibit B-2 (Doc. 15, p. 49)
Exhibit B-3 (Doc. 15, p. 51)
Exhibit B-4 (Doc. 15, p. 53)

Affidavit of Peggy Frankhouser (Doc. 15, p. 55) C

Affidavit of Terry Wood (Doc. 15, p. 61) . . . . . D

Affidavit of Dr. Joan Anderson (with attachment) (Doc. 15, p. 65) . . . . . E

Index to the four-bound volumes of Summary Judgment Evidence

Exhibit E-1 (Doc. 15, p. 68)

Affidavit of Norbert LeBlanc (Doc. 15, p. 74) . . . . . F

Affidavit of Joan M. Lucci Bain (with attachments) (Doc. 15, p. 78) . . . . . G

Exhibit G-1 (Doc. 15, p. 80)
Exhibit G-2 (Doc. 15, p. 85)
Exhibit G-3 (Doc. 15, p. 87)
Exhibit G-4 (Doc. 15, p. 88)
Exhibit G-5 (Doc. 15, p. 125)

VOLUME I

Deposition excerpts and exhibits from the deposition of:

Sergeant Anne Hebert (Doc. 13, p. 5) . . . . . H

Defendant A. Wade Runnels (Volume I) (doc. 13, pp. 214-340) I

Defendant A. Wade Runnels (Volume II (Doc. 13, pp. 341-421) . . . . . J

Exhibit 1 (Doc. 13 p.422)
Exhibit 2(Doc. 13 p.423)
Exhibit 3(Doc. 13 p.425)
Exhibit 4(Doc. 13 p.426)
Exhibit 5(Doc. 13 p.428)
Exhibit 6(Doc. 13 p.431)
Exhibit 8(Doc. 13 p.434)

Index to the four-bound volumes of Summary Judgment Evidence

Exhibit 10(Doc.13, p.440)
Exhibit 11(Doc.13, p.441)

VOLUME II

Deposition excerpts and exhibits from the deposition of:

Defendant Robert T. Fleming (Volume 1 (Doc. 13, pp. 447-569) . . . . . K

Defendant Robert T. Fleming (Volume II (Doc. 13, pp. 570-655) L

Exhibit 3 (Doc. 13, p. 656)
Exhibit 4 (Doc. 13, p. 658)
Exhibit 5 (Doc. 13, p. 660)
Exhibit 6 (Doc. 13, p. 667)
Exhibit 9 (Doc. 13, p. 689)

Defendant Samuel Nuchia (Volume 1 (Doc. 13, pp. 693-699) . . . . . M

VOLUME III

Deposition excerpts and exhibits from the deposition of:

Defendant Samuel Nuchia (Volume II) (Doc. I3, pp. 704-725) . . . . . N

Exhibit 1 (Doc. 13, p. 726)
Exhibit 2 (Doc. 13, p. 745)
Exhibit 3 (Doc. 13, p. 749)

Index to the four-bound volumes of Summary Judgment Evidence

Exhibit 4 (Doc. 13, p. 750)
Exhibit 5 (Doc. 13, p. 753)
Exhibit 6 (Doc. 13, p. 810)
Exhibit 11 (Doc. 13, p. 811)
Exhibit 12 (Doc. 13, p. 812)
Exhibit 13 (Doc. 13, p. 814)
Exhibit 15 (Doc. 13, p. 815)
Exhibit 16 (Doc. 13, p. 828)
Exhibit 17 (Doc. 13, p. 829)
Exhibit 18 (Doc. 13, p. 830)
Exhibit 19 (Doc. 13, p. 831)
Exhibit 20 (Doc. 13, p. 832)

Defendant Clarence O. Bradford (Volume I) (Doc. 13, pp. 833-865) . . . . . O

Defendant Clarence O. Bradford (Volume II) (Doc. 13, pp. 875-887) . . . . . P

Exhibit 1 (Doc. 13, p. 866)
Exhibit 4 (Doc. 13, p. 888)
Exhibit 5 (Doc. 13, p. 890)

Defendant Jerry Jones (Doc. 13, pp. 891-904) . . Q

Defendant Richard Pfeil (Doc. 13, pp. 905-923) R

Exhibit 3 (Doc. 13, p. 924)

Assistant Chief Milton Simmons (Doc. 13, pp. 926-932) . . . . . S

Index to the four-bound volumes of Summary Judgment Evidence

Exhibit 1 (Doc.13, p.938)
Exhibit 3 (Doc.13, p.975)
Exhibit 5 (Doc.13, p.979)
Exhibit 6 (Doc.13, p.982)
Exhibit 7 (Doc.13, p.984)
Exhibit 8 (Doc.13, p.986)

Sergeant Bill Weaver (Doc. 13, pp. 933-937) . . T

VOLUME IV

Deposition excerpts and exhibits from the deposition of:

Supplemental Affidavit of Joan M. Lucci Bain (Doc. 43, F. 53) . . . . . U

Exhibit U-1 (Doc. 43, p. 61)
Exhibit U-2 (Doc. 43, p. 63)
Exhibit U-3 (Doc. 43, p. 66)
Exhibit U4 (Doc. 43, p. 67)
Exhibit U-5 (Doc. 43, p. 79)
Exhibit U-6 (Doc. 43, p. 81)
Exhibit U-7 (Doc. 43, p. 86)

Defendant Samuel Nuchia (Volume III Doc. 43, pp. 89-92) V

Marilyn Louise Mokwa (Doc. 43, p. 106) . . . . . W

Exhibit 2 (Doc. 43, p. 93)
Exhibit 2(a) (Doc. 43, p. 95)
Exhibit 3 (Doc. 43, p. 98)
Exhibit 4 (Doc. 43, p. 105)

Index to the four-bound volumes of Summary Judgment Evidence

Exhibit 5 (Doc. 43, p. 102)

EXPLANATION OF RECORD REFERENCES

This case is part of the Fifth Circuit's test program for the record on appeal in cooperation with the United States District Court for the Southern District of Texas, Houston Division.

Pursuant to that plan, Petitioners were provided a copy of the record on zip disk and do not have access to the hard copy record. This outline is intended to aid the Court in locating documents not in the appendix, in either record. In order to locate documents in the hard copy version, it is necessary to know the deponent's name and page or exhibit number.

References to "Doc. #" refer to both the document number on the zip disk and the docket entry number on the District Court's docket sheet. A reference to "Doc. ___, p. ___" will only enable the Court to find the page on the zip disk. References on the chronology are to the hard copy, but can be traced to the zip disk or to the docket entry through this chart.

APPENDIX J

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[March 21, 1996]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT, Intervenors/Plaintiffs,	)
v.	)**CIVIL ACTION NO.**
	)**H-95-5473**
	)**(JURY DEMANDED)**
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD I. PFEIL, A. WADE RUNNELS, CO. BRADFORD, ROBERT T. FLEMING AND J. R. JONES Defendants.	)

AFFIDAVIT OF DEBBIE L. BENNINGFIELD

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared DEBBIE L. BENNINGFIELD, being by me duly sworn, upon her oath deposed and stated as follows:

1. "My name is Debbie L. Benningfield. I am of sound mind, over eighteen years of age, capable of making this Affidavit, and I am personally acquainted with and have personal knowledge of the facts in this case, including those set forth in Plaintiff's Response to Defendants' Motion for Summary Judgment. I am the Plaintiff in the above entitled and numbered civil action, and as such I am duly authorized to make this Affidavit. All of the facts contained herein are within my personal knowledge and are true and correct.

2. "I began my employment with the City of Houston on July 3, 1975 as a clerk. In 1978, I became a sworn, certified Class B peace officer. Except for a short stint in Houston Crime Information Center ("HCIC"), I have served my entire tenure with the Houston Police Department in the Identification Division.

3. "In 1985, I complained about the discrimination and hostile working condition in my division, which was under the administration of Audra Runnels at the time. Complaints were also made by Peggy Frankhouser and Pamela Grant. An Internal Affairs Division ("IAD") investigation, and Inspections Audit was conducted, partially because of these complaints, and in 1986, Audra Runnels was forced to retire. Audra Runnels

was replaced by his son, A. Wade Runnels, Jr., ("Runnels") as Administrator over the Identification Division ("ID").

4. "After becoming Administrator, Runnels began harassing me and retaliating against me for speaking out against the condition of the division, and filing proper grievances. Usually, the retaliation came within mere days of the filing of the complaint. I filed a grievance against Runnels because he refused to allow me to continue my teaching position. Marilyn Mokwa and Sharon Dunn each filed a grievance over pregnancy discrimination.

5. A "'bum" or 'misidentification" is an erroneous identification of fingerprints, where a fingerprint is attributed to the wrong person. This may result in a contaminated criminal history or an arrest record being attributed to the wrong person.

6. "Runnels filed an IAD complaint against me which accused me of stealing criminal history records. The allegation in the complaint was untrue and was not sustained by the IAD.

7. "On February 8, 1991, Pamela Grant suffered an emotional breakdown while on duty. During the breakdown, she said, 'I can't take this anymore. What are they going to do to me next?'

8. "On March 20, 1991, I gave a sworn statement to David Bell, whom I was told was representing the City's workers' compensation carrier. In the

statement, I described the discrimination and retaliation committed in the ID by Runnels and the assistant Administrator, Tom Fleming ("Fleming").

9. "In 1991; Chief Elizabeth Watson initiated an investigation of the ID called a 'Management Review.' During this review, I gave a tape-recorded statement to Sergeants Bill Harness and Bill Weaver, about the retaliation and discrimination in the department. In addition, I mentioned that there was a problem in the ID with contaminated criminal history records. I tried to give evidence and documentation showing how bad the contamination of the criminal history records were, but Sergeants Harness and Weaver refused to look at it.

10. "As payback for giving my statement in Management Review, Runnels prevented me from attending the state interface meeting for the automated fingerprint identification system ('AFIS'). The AFIS system is a computer system which allows officers to match fingerprints with individuals. I had been involved in the implementation of the system since its inception, and became AFIS manager when Peggy Frankhouser was promoted out of the area to the latent lab. When it was announced that I would not be allowed to attend the meeting, Mark Zeringue, HPD's design contract representative, protested, and asked Assistant Chief Bradford to allow either me or Peggy Frankhouser to go, as we were the only ones who were qualified to participate. Instead, Bradford approved a male officer, Barry McDermott, an officer with no technical AFIS knowledge, to participate.

11. "In or around June, 1991, Fleming told a representative of Printrak, the AFIS manufacturer and service contractor, that I was no longer in the Department's plans for AFIS. When this occurred, I was off the AFIS user's group executive committee, and his statement caused rumors to spread throughout the country that I was being removed from AFIS.

12. "In September, 1991, I gave a statement to Diana Ball, the attorney assigned to investigate a claim filed by Marilyn Mokwa, a co-worker, who had filed a stress-related injury on duty report. In my statement, I described the ongoing discrimination and retaliatory practices in the ID by Runnels, Fleming, and Bradford. Afterwards, Ms. Ball told me that she had tried to speak with Bradford about the situation, but that he refused to listen.

13. Later, Ms. Mokwa resigned from the department. Soon after she left, policy in the ID changed. From then on, all male sworn ID supervisors were assigned to the day shift.

14. "One of the recommendations made by the Management Review was that the AFIS manager position be converted to an ID Officer Supervisor position. The only way I could hold this position would be to take and pass a promotional exam. In the past, I had intentionally chosen not to take promotional exams so that I could continue to work on AFIS. My work and skills with AFIS were known and

recognized throughout the world.

15. "Immediately after I gave this statement, my AFIS training schedule was changed from the day shift to the 11:30 p.m. to 7:00 a.m. shift. Until that point, all of the AFIS training I had conducted was done during the normal day shift. To continue teaching, I would have had to change my shift to the night shift. As explanation, Runnels and Fleming told me that they didn't want to disrupt the night shift personnel's sleeping habits. When I objected to being assigned to train on night shift, the training assignment was taken from me and given to other officers, who received overtime pay to train on the night shift, instead of having to change their own shifts. Later, once Pfeil replaced me as trainer, all training was done on the day shift, and continues on the day shift to the present time.

16. "On January 10, 1992, fearing further retaliation, Peggy Frankhouser and I submitted a written request to meet with Chief Elizabeth Watson, to discuss the *Health and Welfare of the Identification Division and its Employees,* a letter we wrote which addressed the discrimination, retaliation, contaminated criminal histories, and mismanagement in the ID. As required, we submitted this letter to Chief Watson through the chain of command, which required that it be submitted through Runnels and Bradford. Instead of forwarding our request to meet with Chief Watson, Bradford came to the Latent Lab, and met with us personally. Bradford accused us of being troublemakers, and refused to allow us to explain the letter. Bradford told

us that 'he did not want to hear our problems.' When we tried to explain about the retaliation which had been going on, Bradford laughed at us. I became very upset and emotionally distraught, to which Bradford responded that he 'thought his presence seemed to perturb us,' and left. Finally, on February 7, 1992, we were permitted to meet with Chief Watson for 15 minutes. Bradford was there as well. At the meeting, Peggy Frankhouser and I presented, for the first time, *Health and Welfare of the Identification Division and its Employees*. Watson listened to our complaints, and instructed Bradford to investigate and inform us of his findings.

17. "On March 12, 1992, Bradford sent me a response to their *Health and Welfare of the Identification Division and its Employees* letter. This response did not address our concerns, but just enclosed a copy of the 'Management Review,' which is the same letter he sent to all personnel in the ID division.

18. "On March 16, 1992, Peggy Frankhouser and I met with Runnels to discuss Bradford's 'response' to the Management Review. We told Bradford that we didn't think, his response addressed the discrimination and retaliation or the serious problems with erroneous arrest information being added to criminal histories. We also advised Nuchia in writing that Bradford's response was the equivalent of no response at all. Nuchia then ordered us to send Bradford a written explanation describing which complaints Bradford's "response" failed to address We sent this letter to Bradford on March 18, 1992, and sent a copy to

Nuchia.

19. "A male officer, Robert LeBlanc, complained of discrimination as well. In response, Nuchia raised LeBlanc's job performance review ("JPR"). Nuchia was not even with the Department during the rating period and had no familiarity with LeBlanc's performance during that period, and the Civil Service requires that only two (2) levels seniority higher than the person being rated can change a JPR.

20. "In or around 1989, I held the rank of Fingerprint Classifier II, ('FPCII'). Although all other FPCII's were assigned to report to ID Officer Supervisors, I was assigned to report directly to Runnels, an Administrator. I was the only FPCII who reported to Runnels, Pamela Grant, also an FPCII, was assigned to report to Assistant. Administrator Fleming around that time as well.

21 "Officers Jones and Bradford called a meeting with classified B and C officers to advise us of the change in command from Bradford to Jones. At the meeting, Jones informed Peggy Frankhouser and me that any complaints had to be addressed through the chain of command, which meant that they had to be sent through Runnels and Fleming. That meant we had to report our supervisor's wrongful conduct to the people committing the wrongful conduct. At the same meeting, Runnels informed us that he had been given a copy of our 18-page letter that had been provided to Chiefs Watson and Nuchia in February and March of 1992. Bradford and Nuchia were the only people who

could have provided Runnels the letter at that time.

22. "On July 1, 1992, Jones, Bradford, and Nuchia met with Class B and C officers to discuss upcoming changes in the classification structure. At that meeting, I asked Nuchia about the three (3) vacant ID Officer Supervisor positions, and the Department's refusal to give the promotional test. Nuchia said that he could just 'abolish the positions.'

23. "In July, 1992, Peggy Frankhouser and I were required because of our AFIS duties to attend the annual Printrak conference in California. Peggy Frankhouser and I were required to share a room while the male officers who attended were not. Male officers were given private rooms, and were not required to pay an additional amount for the privilege. In fact, on many occasions, other male officers, including Zeringue, Wood, Klein, and Anderson have been allowed to attend various conferences and not been required to share hotel rooms.

24. "Finally, on July 27, 1992, I went to HPD's Psychological Services Unit due to my strained psychological state. I had been constantly threatened by Runnels that he was going to remove me from the AFIS system, had been repeatedly humiliated in front of my co-workers, had been falsely accused of being a troublemaker, and had been ordered by Runnels to document every AFIS error by co-employees, which alienated the supervisors and employees against me. The supervisors and employees were not told that I was ordered to document these errors, and when they complained, Runnels lead them to believe that I was

initiating the complaints on my own, trying to usurp authority as AFIS manager. These actions caused widespread resentment against me in the department. Because Runnels had been given a copy of the "Health and Welfare" letter, I feared severe retaliation by Runnels and Fleming if I were to file a complaint that they were to see. Because of Jones' order to file any complaint through my direct supervisor, I had to deliver my complaint directly to Runnels.

25. "Psychological Services referred me to an independent psychologist. On August 3, 1992, I called in sick due to an upper respiratory infection. I returned to work the next day, still ill, but taking prescribed medication. That morning, I found a note from an co-worker on the night shift regarding a problem with AFIS. I approached the worker to discuss the problem when another co-worker jokingly made comments to me about my job performance. When I was leaving, a co-worker jokingly made a comment about my flowered dress, and how irritated I seemed. Still ill and on medication, and overcome by the accumulated stress, threats and hostile environment, I lost control, I turned to the co-worker and stated that I couldn't take the abuse anymore and was going home sick. Later, I was accused of using profanity in this exchange by a co-worker, who claimed he heard something to the effect of 'I can't take this shit, I'm sick, I'm going home.' I left the department, and went home early. I then immediately left town and went to Austin, and checked myself into a hotel room under a false name for three (3) days. I didn't report to work on August 5 or 6 of 1992.

26. "When I didn't report to work, Runnels filed a missing persons report in the Juvenile Division of HPD. Nuchia and Jones approved the missing persons report. After the report was filed, Homicide investigators contacted my family, causing them great alarm. No attempts were made to locate me before filing the report.

27. "On August 10, 1992, after I had returned to work, I sent a written request to Nuchia through Runnels and Jones, as required by the chain of command, explaining what led to my leaving town. In that letter, I again complained about the discrimination and retaliation against me in the ID. I requested that IAD be assigned to investigate the incident instead of Jones office since Jones had refused to respond to my complaints in the past, and since Runnels was the primary perpetrator of the discrimination and retaliation. Nuchia refused this request, assigning Jones' office to investigate the incident.

28. "During the investigation, I asked permission to explain my actions. Jones refused. The entire investigation of the alleged AWOL consisted of three (3) questions which I was asked. These were:
    1. Did you leave work without permission?
    2. Did you fail to report to work?
    3. Did you use profanity?

29. "Before the investigation was completed, Runnels disciplined me for the incident: First, he removed my title as AFIS Manager, and placed AFIS under Pfeil, an ID Officer Supervisor, knowing Pfeil sented me

because of my documentation of all AFIS errors under Runnels' orders. Runnels ordered me to report to Pfeil, docked my pay, and lowered my JPR, all before any investigation was conducted. Throughout the investigation of this incident, I was represented by Jan Rich, during the approximate period of 1992 to 1993. Ms. Rich also represented me in connection with the IAD investigation.

30. "On August 11, 1992, I asked that the days I had been absent be carried as sick time. Runnels denied the request.

31. "The Employee Concerns Committee is a committee which deals with employees who have disciplinary problems. On August 14, 1992, in an attempt to obtain a fair investigation, then HPOA attorney Jan Rich, and HPOA President Mr. Elder, met with Nuchia about the problems in ID. Nuchia informed Ms. Rich and Mr. Elder that he was not interested in anything that had happened in the past, that he intended to discipline me for the AWOL, and that he felt Ms. Wood and Ms.Mokwa were non-credible.

32. "On August 31, 1992, Runnels ordered me to train Pfeil on the AFIS system. Even though I had been stripped of my rank, Pfeil told me that I was still responsible for the maintenance of the AFIS system and all of the AFIS responsibilities that I had previously performed.

33. "During September of 1992, Pfeil continually harassed me by holding me accountable for the AFIS system

while repeatedly circumventing me on the system. Pfeil removed me from the Printrak service contract, began listening to my telephone conversations, questioned me regarding the contents of my phone conversations, falsely accused me of withholding information about the system, and opened my mail. In addition, Printrak was informed that Peggy Frankhouser and I were no longer authorized contact persons for the AFIS system.

34. In early September, 1992, Jan Rich met with Jones to request that I be reassigned from the ID due to the accumulating stress from Runnels, Fleming and Pfeil. Her request was refused.

35. The next day, on September 5, 1992, Runnels, Fleming, and Pfeil lowered my JPR, purportedly on the basis of the alleged AWOL incident. I pointed out that I was investigated, and disciplined in multiple ways for the alleged AWOL incident while Harry Hope, who was also under investigation was not disciplined. I brought these issues to the attention of Nuchia, Jones, Pfeil, Runnels and Fleming, in the hopes that they would recognize the disparity in treatment between males and females. However, instead, they lowered Harry Hope's JPR rating, to prevent me from proceeding on a claim of discriminatory treatment in the lowering of my JPR. Jones' office had still not completed any investigation of the incident.

36. Throughout the fall of 1992, Pfeil, Runnels and Fleming continued to harass me. They refused to

allow me to attend conferences necessary to the performance of my duties. I was constantly prevented, from performing my duties on AFIS. Information was deliberately withheld about system problems until it reached crisis stage and no one else was qualified to repair it. I was then blamed for the system's downtime. People who were unfamiliar with the system were being permitted to work on it, without training or supervision, causing further damage to the system and its database, and endangering the service contract with Printrak. I repeatedly wrote to my supervisor Pfeil, and up the chain of command, that the increasing downtime was affecting public safety, and that I could not be held responsible for the performance of the system when I was not notified in a timely manner of problems that had arisen. At one point, Pfeil, Fleming, and Runnels recommended to Assistant Chief Simmons that the City spend nearly $50,000.00 to fix a library handler. Chief Simmons asked me for my recommendation and I told him that the equipment was covered under the maintenance agreement with Printrak and should be fixed without cost to the City.

37. "Pfeil was also unable to prepare a software program that he was ordered to prepare because of his lack of knowledge of the system. Just prior to the deadline he ordered me to prepare the program, which I did.

38. "These AFIS problems took place from the 'time Pfeil took over the AFIS system in August 1992, throughout 1993, 1994, and 1995. I accepted the promotion to Latent Examiner in 1993, because the

department refused to assign me to AFIS after I passedthe ID Officer Supervisor test in June 1993. Assistant Chief Simmons ordered me put back on AFIS contact lists after my promotion to Latent Examiner because I was still the only qualified person to handle the system. Runnels and Fleming attempted to prevent my placement on the AFIS contact list, by telling Simmons that I was a troublemaker.

39. "On September 21, 1992, I met with Captain Holland and Lieutenant Coleman in the IAD. I asked them if they would meet with Assistant Chief Kendrick (Assistant Chief over IAD) and Nuchia, to try and convince Nuchia to let IAD investigate the alleged AWOL incident instead of Jones' office. I was convinced that Jones' office would distort the investigation, and further punish me for my complaints about the hostile working environment in the ID. I also pointed out that under the Local Government Code, Civil Service Section dealing with the police department, specifically Section 143.123(e), and the General Orders of the Houston Police Department (General Order 200-3), any person that has personal involvement involving alleged misconduct is not permitted to be involved in the investigation. Captain Holland agreed to meet with Nuchia about my request. At this meeting, I provided Captain Holland with a copy of the letter titled *Health and Welfare of the Identification Division and its Employees* which had previously been provided to Nuchia and Chief Watson.

40. "On October 13, 1992, I filed a formal complaint in

the IAD for discrimination and retaliation. At IAD's suggestion, the 'Health and Welfare' letter which was provided to Nuchia was used as the complaint. The next day, October 14, 1992, Jones' office released their recommended disciplinary action against me for the alleged AWOL incident. Jones, with the approval and recommendation of Runnels, Fleming and Pfeil, recommended that I be issued a written reprimand for being AWOL and for having used profanity in the workplace. Attached hereto as Exhibit 1 is a true and correct copy of the Discipline Worksheet issued by Jones. HPOA attorney Jan Rich asked Jones once again to consider the allegations raised in my prior complaints in the Department, and in my EEOC complaint. Jones informed Attorney Rich that he had already spoken with Nuchia about my EEOC charge.

41. "On October 28, 1992, the Administrative Disciplinary Committee recommended to Nuchia that I receive a written reprimand, and that Harry. Hope receive an oral reprimand as a result of the alleged AWOL incident.

42. "My IAD complaint was assigned to Sergeant Anne Hebert for investigation. I begged IAD to remove me from the ID while the investigation was pending, fearing further retaliation from Runnels, Fleming and Pfeil.

43. "On December 1, 1992, Peggy Frankhouser and I met with City Personnel Director Stephanie Burkes, and Laura Peters from Risk Management. We explained that our personal health and welfare were being

affected by the continued, discrimination and retaliatory practices by Nuchia, Bradford, Jones, Runnels, Fleming and Pfeil. At the end of meeting Ms. Burkes agreed to meet with Nuchia again and explain how she had seen firsthand the affects that the discrimination and retaliation had on us.

44. "On December 4, 1992, Civil Service conducted the hearing on my grievance over the lowering of my JPR after the 'AWOL' incident. Frankhouser, Officer Hope, and Sergeant Hebert all testified on my behalf.

45. On December 14, 1992, I received a written reprimand from Nuchia for the alleged AWOL incident, which I was informed would be permanently placed in my office. I was also reprimanded for having used profanity, despite the fact that profanity is extremely common among my male co-workers.

46. "On December 31, 1992, the hearing examiner who heard my JPR grievance issued her formal ruling. In that ruling, she cautioned HPD that the investigation of my 'AWOL' conducted by Jones's office was totally inadequate, and that certainly the Houston Police Department should have began able to spot that the investigation was anything but complete and objective. She further ruled that allowing the investigation in this instance by those within the chain of command was flawed because it allowed them to judge themselves. Furthermore, she found that the timing of discipline against me was curiously suspect to say the least and could be viewed as malicious retaliation.

47. "When an officer is accused of being mentally unfit for duty, it becomes difficult, if not impossible, for the officer to find another position in the field. Because of the strict standards for certification, and hiring, such information would have to be disclosed on any application for employment.

48. "In 1991, several ID Officer Supervisor positions became open. Under the law, the Department had to hold a test to determine who would fill the position. In January of 1992, I requested that Jones and Runnels certify or request that the test be given. Jones and Runnels refused, purportedly because the previous eligibility list had not expired. Thus, because the test was not given, I was prevented from promoting since 1991.

49. "On February 9, 1993, I met with Sergeant Hebert in IAD to provide information and documentation in support of my October IAD complaint. The documentation demonstrated the erroneous criminal histories which were being maintained in the Houston Police Department, about which I had complained on numerous occasions to Runnels, Fleming, Jones, Bradford, and Nuchia.

50. "I met with Sergeant Hebert again on February 16, 1993. Sergeant Hebert agreed with me that she did not feel that it was safe for me to return to the ID, and ordered me to report to IAD until further notice. I had begged Hebert and her supervisors to move me from ID during the IAD investigation.

51. "On February 23, 1993, Nuchia. issued a circular, stating that allegations of discrimination are non-grievable in the Houston Police Department. Attached hereto Exhibit 2 is a true and correct copy of Circular No. 93-0223-2. On February 25, 1993, I was called into IAD, and notified that I was being referred to the APC-where I was ordered to undergo psychological examination to determine my fitness for duty. I was also ordered back to the ID, despite the recommendations of Sergeant Hebert, where would continue to be supervised by Fleming, Runnels and Pfeil. When I was presented the letter by Captain Holland in IAD, I broke down. Captain Holland informed me that it was not his decision to do this but that he was only following orders. At the time, Bradford was chairman of the APC. When I learned this, I informed Sergeant Hebert that I was being further retaliated against, since Bradford, against whom I had lodged complaints, was now going to have the authority to determine my fitness for duty.

52. "On March 10, 1993, Sergeant Hebert informed me that she was being told what she could and could not investigate, that the decision had been made that the alleged AWOL issue would not be reopened, and that the disparate treatment issues would not be investigated. Sergeant Hebert also told me not to be surprised if in the end the investigation would end up as not sustained because of the limitations placed on the investigation.

53. "On March 15, 1993, Jan Rich and I met with Jones to again request that I be reassigned outside of the ID

pending the investigation, and until my health improved. Jones denied the request purportedly based upon the fact that I was a Class B officer, and could not be given a temporary assignment outside of that classification. I told Jones that at least two (2) male Class A officers had been assigned in the Class B service for several years, in the Photo Lab, and had been working outside of their classification due to stress. In response, Jones stated that Nuchia could assign people wherever he wanted.

54. "At the end of March, 1993, I wrote to IAD to ask why my complaints of disparate treatment and harassment were not being investigated. I gave examples of ongoing discrimination and retaliation. In response, Sergeant Hebert advised me that she had been directed by Nuchia not to address certain issues that had been raised in the complaint. I was instructed by Captain Holland, Sergeant Hebert's supervisor, to list specific acts of disparate treatment.

55. "Sergeant Hebert later explained that she had been told that HPD's Inspections Division would conduct an emergency audit of the ID to investigate the allegations of mismanagement.

56. "The audit of the ID by Inspections has to this day never been performed.

57. "On April 12, 1993, I was warned by a supervisor in the ID that I needed to be very careful because Runnels, Fleming, and Pfeil were 'out to get me.' I reported these comments to IAD.

57. "On May 4, 1993, the Civil Service hearing was held concerning my grievance over the discipline I received for the alleged AWOL and use of profanity. Peggy Frankhouser and Sergeant Hebert both testified at that hearing or my behalf. During this hearing, Officer Walter Stairhime testified that he had personally used obscene language toward Fleming. At the conclusion of the grievance hearing, the Civil Service examiner ordered that the written reprimand which was placed in my file be removed.

58. "On June 10, 1993, the City Finally gave the promotional exam for the ID Officer Supervisor vacancies. I took the exam and was the only one who passed. The results of the promotional exam were released on June, 11, 1993. On that day, Nuchia, Bradford, and Jones ordered me through Runnels to report to the APC on June 24, 1993, the day before I was scheduled to take a promotional exam for latent print examiner. Even though I had been informed by IAD in February of 1993 that I was being referred to APC, the issue was dropped and I never received orders to report to the committee until after I passed the promotional exams, and the department was aware that they would be required by state law to promote me.

59. "On June 24, 1993, I reported to the APC as ordered. The Committee was chaired by Bradford. As a condition of employment, Bradford ordered me to submit to a psychological evaluation to determine whether I was fit for duty. Bradford chaired the Committee which was to make this decision. I asked

why I had been referred to the Committee and was told by Bradford that it was because of my long history of problems with management. He said that if I would say that I was not under stress, he would not force me to undergo psychological evaluation. I responded that I was under an extreme amount of stress because of the harassment, retaliation and discriminatory practices in the Division. I also told the Committee that Bradford, Jones, and Nuchia had allowed and even participated in those practices after I reported them. I attempted to explain some of the problems I had reported both in the Management Review and to IAD. However, Bradford cut me off, telling the Captains on the Committee that he was personally familiar with the Division since he had served as Assistant Chief over it, and he knew that I was not telling the truth. Bradford then presented a letter directing me to submit to a psychological evaluation and stating that my future employment with the Department was contingent on my willingness to cooperate and the results of that evaluation.

60. "On June 25, 1993, after the extremely trying experience of reporting to the APC, I took the latent print examiner test for which I had registered, and placed first. After I found out that I had placed number one (I) on both the ID Officer Supervisor and latent print examiner promotional tests, I wrote a letter to Fleming and Runnels asking whether I would be reinstated as AFIS Manager once promoted to ID Officer Supervisor, as I was the most qualified person in the Division to run the AFIS system.

61. "Fleming and Runnels did not respond to this letter, so I wrote again. Eventually, Fleming and Runnels advised me that I would not be reinstated as AFIS Manager, but rather would be assigned to a night shift at the Westside Station.

62. "On July 2, 1993, as ordered, I notified Bradford that I had chosen Dr. Anderson to perform the psychological evaluation. I requested that Bradford stagily the allegations that placed me in the Committee in the first place, so that Dr. Anderson could properly evaluate me. Bradford refused to put anything in writing.

64. "A few days later, while I was off duty and out of the office, Pfeil removed all of my work, file cabinet, and personal belongings from the secured area in which they were required to be kept and placed them in the hallway.

65. "On July 21, 1993, I was ordered to report to Nuchia's office on July 26, 1993, to discuss the possibility that I would be passed over for promotion. I appeared, at that meeting with private counsel. When we arrived, we were met by Nuchia, Bradford, two (2) city attorneys, HPD's legal attorney, Craig Fennell, Assistant Chief Simmons, and Nuchia's administrative assistant, Lieutenant Buck Owens. All of the representatives for the City were male. All were lined up around the room facing me, and I was placed in a chair in front of Nuchia's desk. Nuchia opened the meeting by telling me that my failure to comply with the ordered psychological examination was going

to cause me to be passed over for promotion. I explained that I had chosen the psychologist to perform the evaluation as ordered and had a scheduled appointment with the psychologist. Nuchia accused me of taking too long to get the test performed. In response, I offered evidence to the contrary. The meeting ended with a somewhat heated exchange between my counsel and Nuchia.

66. "On July 23, 1993, the Civil Service Commission overruled Nuchia's appeal of the hearing examiner's findings against the City in the alleged 'AWOL' and profanity issues. On August 9, 1993, Nuchia ordered me to report to his office. At that meeting, I was informed that I would be promoted. Nuchia stated that he could not help what had happened in the past, and further stated that 'Runnels had rights also.'

67. "On August 13, 1993, I was promoted to latent print examiner. Because I had been told that I would not be allowed to work with AFIS, I chose to promote to latent print examiner so that I could remain on a day shift assignment at Central, a location closer to home. Fleming refused to allow co-workers to help me move my furniture and belongings and told me to do it myself. A few months later, when offices were reassigned, Fleming allowed male co-workers to assist each other in moving, and even paid them overtime funds for time spent doing so.

68. "That very same day, on August 13, 1993, the Department gave another test for ID Officer Supervisor, to fill the vacancies that remained open

after I chose to promote to latent print examiner. This was one of the same vacancies that had existed since I had first requested the promotional exam be given in January of 1992. Because I was the only person to pass the June 1993 exam, a vacancy remained open. Now that I was not available to fill the position, the department immediately retested, allowing Larry Williams and other males to retest for the vacancy. Larry Williams took the test, and passed it with the minimum score. Mr. Williams was promoted, and allowed to retain his previous assignment on day shift at Central because of his special expertise in voice prints.

69. "I filed this suit on August 27, 1993.

70. "Throughout the pendency of this suit, the Defendants in the suit have continued, to discriminate and retaliate against me. For example, I was denied overtime requests, have been denied travel to training schools, and have been ordered not to submit requests to attend training schools. Despite a request from the Executive User's Group for Printrak, (the AFIS users) that I serve on the executive committee, Runnels and Fleming denied the request. Several male officers continue to be given special assignments outside of their job title due to special skills. I have never been allowed to resume my position as AFIS Manager. Additionally, I am assigned overly difficult assignments, such as a backlog of over 1,000 latent cases dating back to June, 1993. I was assigned to handle all of the backlog.

SUBSCRIBED AND SWORN TO before me by Debbie Benningfield this 21 day of March, 1996.

/s/_____
Mackwell Hickerson
Notary Public in and for
the State of TEXAS

MACKWELL HICKERSON
Printed Name of Notary

My Commission Expires: 4/12/99

EXHIBIT A-1

Discipline Work Sheet
(Word processed from original form)

STEP ONE:

Citation	**Category**
Failed to report for duty (did not report her absence to a supervisor for (2) days)	B
Respect for fellow employees (used profanity in the workplace in the presence of a supervisor and coworkers)	A

STEP TWO

Same or Similar Sustained Cases	**Adjusted Category**

STEP THREE

Mitigating and/or aggravating factors: Ms. Benningfield's past performance, professionalism and responsibility towards the workplace has been outstanding. She has not denied the allegation of not reporting for duty August 6, 1992 and August 7, 1992. Ms. Benningfield admits she did not receive permission from a supervisor for her absences. Also, she does not deny (doesn't recall, due to state of mind) her use of

profanity in the workplace on August 5, 1992. However her actions of failing to report for duty on August 6, 1992 and August 7, 1992 (without the consent of a supervisor) was highly irresponsible. Her explanation of the incident does not reveal a substantial motive for this type of action. It has cost the department numerous manhours in the quest to locate her and paperwork involved. She has also brought undue hardship and concern upon friends, coworkers and relatives.

Her demeanor and vocabulary normally does not include profanity. This conduct should not be tolerated; but in this instance it should be attributed to her physical state and perhaps the medication she was taking for her ailment.

Discipline Meeting: Date: 10/14/92 Time: 11:15 AM
Location: 61 Riesner
Attendees: Ms. J. Rich; Ms. D. Benningfield; Mr. R.J. Pfeil and A/C; J.R. Jones

Final Disciplinary Recommendation: Written Reprimand

Has the employee been advised of the final recommendations?
Yes X No ___

Does the employee agree with the final recommendations?
Yes ___ No X

I disagree with the disciplinary action recommended above:
/s/_____
Debbie Benningfield
Date: 10/14/92

/s/_____
J.R. Jones 42318
Date: 10/14/92

Affidavit of Debbie L. Benningfield

EXHIBIT A-2

CIRCULAR HOUSTON POLICE DEPARTMENT

FEBRUARY 23, 1993 No. 93-0223-2
SUBJECT: GRIEVABLE ISSUES

The department's policy on accepting Grievances from officers has changed.

The Personnel Division Grievance Counselor will now review all complaints to determine whether or not the issues are grievable. They will examine the Texas Local Government Code, the Code of Ordinances and the Civil Service Commission Code when making their determination. Unless the Grievance Counselor can find specific authority that the complaint is grievable, the complaint will be considered a managerial decision and not accepted as a Grievance. However, if an officer disagrees with the Grievance Counselor's findings and is able to cite specific sections of the codes, which pertain to their complaint, the thirty (30) day limit will be waived while the Grievance is taken under consideration.

If a complaint is determined not to be grievable, the officer may forward the complaint in a letter to the Chief of Police, through the chain-of-command.

The list below is intended to provide a general overview of issues that are grievable. It should not be considered all inclusive as issues may be added to either category at some future date.
GRIEVABLE ISSUES are as follows:

1. Oral Reprimands
2. Written Reprimands
3. Job Performance Reviews
4. Transfers (i.e. denials)
5. Job Assignments
   (i.e. change of shift or days off)

NON-GRIEVABLE ISSUES are as follows:

1. Disciplinary Suspension
2. Indefinite Suspension
3. Promotional Pass Over
4. Demotion
5. Allegations of Discrimination based in whole or in part, on:
   a) Race
   b) Color
   c) Religion
   d) Sex
   e) National Origin
6. Change of District Assignment
7. Change of Beat Assignment
8. Change of Partner Assignment

Officers with questions about the Grievance procedure and/or grievable issues should direct their inquires to Sgt. Tom Jennings of the Personnel Division Grievance Section or the Legal Services Unit.

/s/_____
Sam Nuchia
Chief of Police

EXHIBIT A-3

CITY OF HOUSTON
PERSONNEL DEPARTMENT

Post Office Box 1562
Houston, Texas 77251-1562
713-658-3701

Ms. Debbie L. Benningfield
21818 Musket Run
Hockley, Texas 77447

Dear Ms. Benningfield:

Attached is a copy of the Grievance Examiner's written findings and recommendation for solution of your grievance which was heard on December 21, 1992. Per Section 143.131 of Chapter 143 of the Texas Local Government Code, you or your department head have ten calendar days from the date of receipt of the attached to file a Step IV grievance form if either of you are dissatisfied with the proposed solution.

Should you or your department head file a Step IV grievance, the case will be reviewed by the Civil Service Commission based upon the transcript, the demonstrative evidence offered and accepted at the Step III hearing and the findings and recommendation of the Grievance Examiner. If a Step IV grievance form is not timely filed, the solution will be accepted by the Commission.

If you have any questions, please contact me at 658-3745.

Sincerely,

/s/_____
Roland Bienvenu
Personnel Specialist

cc: Alice C. Perrenot, Personnel Department Chief Sam Nuchia, Houston Police Department Sgt. Tom Jennings, Houston Police Department Elizabeth Trevino, Legal Department Jan Rich, HPOA File FY93-CP-15

GRIEVANCE EXAMINER FOR OF CLASSIFIED EMPLOYEES OF THE CITY OF HOUSTON	)	IN THE MATTER
	)	**CASE NO.**
	)	**FY93-CP-15**

WRITTEN FINDINGS AND RECOMMENDATION FOR SOLUTION

On December 4, 1992, Ms. Debbie Lynn Benningfield, Employee Number 53865, who is classified as a Fingerprint Classifier II in the Police Department of the City of Houston, requested a hearing before a Grievance Examiner for Classified Employees of the City of Houston pursuant to the Grievance Procedure established by Ordinance No. 77-1726. I have reviewed all of the jurisdictional requirements and found everything to be in order.

A full and complete hearing was held before me on the 21st day of December, 1992.

Ms. Benningfield was represented at the hearing by Ms. Jan Rich, Staff Attorney for the Combined Law Enforcement Associations of Texas. The Department was represented by Ms. Elizabeth Trevino, Assistant City Attorney; and Assistant Chief Jerry Jones. Appearing as witnesses were the Grievant; Joan S. Anderson Ph.D.; Mr. Harry Hope; Mr. Norbert L. LeBlanc; Mr. Richard Pfeil; Chief Jones.

Also in attendance at the hearing were Ms. Peggy Frankhouser, Latent Print Examiner for the Houston Police Department; Mr. R. T. Fleming, Assistant Administrator,

Identification Division, Houston Police Department; and Mr. Roland Bienvenu Personnel Specialist Employee Relations Division, Personnel Department of the City of Houston.

Ms. Benningfield contends that her Job Performance Review, rating was improperly lowered 1.5 points. She alleges that the incident giving rise to the lower rating was still under investigation at the time the JPR was written, and thus was not justified until a full investigation had been conducted. In resolution of her grievance, Ms. Benningfield request that her JPR be changed to reflect 29.0 Total Points.

Evidence submitted indicates that the Grievant left her job without permission on August 1992, and failed to report for duty on August 6-7, 1992. She also failed to call in to report her absence. A missing persons report was filed which indicated that the Grievant had left her office after an argument with a co-worker. At the hearing the departure, failure to report for duty and failure to call in were referred to as the "AWOL" incident. The precipitating incident occurred on August 5, 1992, during which the Grievant was said to have used profanity in response to a comment from a co-worker, Mr. Harry Hope.

According to Mr. Hope's testimony, the Grievant had stopped to talk to Bob Thomas about problems on the night shift with the Automated Fingerprint Identification System (AFIS), because the Grievant's position was AFIS Manager. Mr. Hope testified that as the Grievant walked by in a flower-printed dress, he told her to "shake them flowers." The grievant, apparently not in a mood for such jocularity, responded something to the effect, "I'm sick and shut your

goddamn mouth." Mr. Hope testified that the Grievant then left the office. The next day the Grievant was not at work and had not left a message on the voice-mail indicating she would be absent. Such behavior by the Grievant was inconsistent with how she handled prior absences as she had always notified the Department in the past. Mr. Hope further testified that his JPR rating had not been lowered initially for his part in the August 5 incident, but he did receive an oral counseling and on December 18, 1992, his JPR rating was lowered.

Dr. Joan Anderson is a clinical psychologist in private practice, and has been seeing the Grievant on a professional basis about every other week since August, 1992. Dr. Anderson described the Grievant as a bright woman, with good ability to conceptualize, and in generally good mental health, from both an affective and cognitive standpoint. However, in her professional opinion, the Grievant exhibits the symptoms of major stress that seems to be confined to the workplace. Dr. Anderson did not just take the Grievant's word for the work environment, but investigated the circumstances for herself. In her opinion, the stress from the work environment was responsible for the Grievant's problem. On cross-examination Dr. Anderson stated in response to a hypothetical question, if one of her employees left the office without notice, she would be concerned about the reason the person had left.

The Grievant's testimony indicated that problems in the Identification Division had been in existence for a very long time, and that she and mother female employee (Peggy Frankhouser) had attempted to resolve those problems. Unfortunately, those attempts had been met with a great deal of resistance, according to the Grievant. A large part of the

problem related to the management in the division, and the Grievant and Ms. Frankhouser had gone over their heads to the Chief of Police. The Grievant contends treat the stress within the Identification Division was almost unbearable and had caused some person to leave on disability. The situation is exacerbated by the fact that the Grievant's job as a Class B officer is a restricted technical assignment, and she cannot transfer to another assignment.

Further, the Grievant admits she was AWOL, but testified that she believes she has received not just one disciplinary action for the AWOL incident, but multiple act of discipline. The Grievant contends that in addition to her JPR rating being low, red, she was docked two days pay for the absence, received a written reprimand, and her job as AFIS manager was abolished. She also contends that the discipline imposed has been handed out in a disparate manner, and that the Department is retaliating against her for calling attention to disparate treatment in the Department.

Although the Grievant requested that Internal Affairs investigate her complaints, the actual investigation was performed within her chain of command. According to the Grievant. she requested that a complete investigation be made, including the reason leading up to her actions on August 5-7: However, the investigation only asked the following questions of the Grievant:

1 . Did you fail to report for work on August 6 and 7, 1992?

2 . Did you have permission to be absent August 6 and 7, 1992?

3. Are you contending there was sexual harassment?

4. Did you use profanity in the office on August 5, 1992?

The investigation was concluded just prior to the hearing in this case, and the Grievant's JPR was adjusted by 0.5 to a new Total Points of 28.0, and from "Very Good" to "Outstanding". A written reprimand was also given to the Grievant for the AWOL incident and for the use of profanity in the work place.

Mr. Richard Pfeil testified that he became the Grievant's supervisor immediately after the AWOL incident. He explained that the JPR rating was lowered because of the AWOL incident and the use of profanity in the workplace. He also testified that to leave without permission was not acceptable conduct. Although he admitted that there had been problems in the Identification Division, he had been able to withstand the problems through the years, and that the problems did not justify the Grievant's unexcused absence.

Chief Jones testified that the missing persons report was filed because the Chief of Police had suggested it. There was no retribution involved in filing the report or with the contents of the report, but the only motivation was concern for the Grievants welfare because she was, at that time, unaccounted for at work or at home. With respect to the profanity, Chief Jones testified that it should be considered, but the degree of discipline imposed should be decided by the supervisor.

RECOMMENDATION FOR SOLUTION

It should be emphasized first that the grievance in this matter concerns only Ms. Benningfield's JPR, and my ruling will technically only be on that issue. However. because the evidence raises other concerns, I will also address those concerns. My ruling does not in any way deal with any allegation of discrimination.

It is my opinion that Ms. Benningfield has been subjected to multiple instances of punishment for one incident. The Department apparently has treated the AWOL incident separate and apart from the profanity in the workplace incident, and in my opinion, the incidents cannot be separated. The AWOL incident is indeed an extremely serious violation of policy. I know of no employer who would completely overlook such a violation. However, it is incumbent upon management to ask why the situation got to the point that an outstanding employee believed the only solution was to absent herself from the workplace. Thus, the investigation by the chain of command that was limited to "did you do it and did you have permission to be off" is totally inadequate. A complete, objective investigation was required in this instance., and of all organizations, the Police Department should be able to spot that this investigation was anything but complete and objective, I believe the investigation by those within the chain of command in this instance is flawed because, in inquiring into the background of the AWOL incident, it asks them to judge themselves.

I am likewise concerned that the Grievant's previous position has been abolished. The timing is curiously suspend to say the least, and could be viewed as malicious retaliation by some. Unfortunately, though, that issue is not before me

at this time.

Also not before me at this time is the issue to' the written reprimand. Nonetheless, I find it hard to believe in light of the multitude of other problems in this work group, thru a written reprimand is issued for a person using the word "goddamn" on one occasion in a very small, private group of workers. Apparently the Houston Police Department issues a written reprimand every time an officer uses profanity!

Of course the Department's position is that the written reprimand was issued for both the AWOL incident and the profanity. This argument does not pass muster in light of the fact that the Grievant's pay was docked for the two days she was absent even though she had plenty of vacation time to which the absence could be charged. Docking the pay in this circumstance takes on the appearance of a suspension without pay, and since the written reprimand is imposed in part for the AWOL incident, the conclusion is that the Grievant was punished at least twice for one offense, which is clearly improper.

Finally, we turn to the actual issue before the Grievance Examiner the JPR rating. In my opinion the JPR is not a disciplinary tool. Also, it is certainly proper to examine attendance, dependability, and responsibility in evaluating an employee's performance. Leaving the job without permission is an extremely serious violation, and failure to report is also very serious. Such a violation is a negative aspect o£ an officer's record, and thus, is a proper basis for a performance evaluation. Ms. Benningfield must understand the seriousness of her actions, and must accept the consequences, even though there were extenuating

circumstances. Therefore, I do not find sufficient evidence to overturn the JPR rating of 28.0.

Still, I caution the Department to thoughtfully consider my other opinions expressed herein and determine whether action is warranted by the Department to correct the problems that exist I also direct that should any other grievance(s) be filed by Ms. Benningfield which arise out of the matters addressed in this Opinion, then my Opinion is to be provided to the Grievance Examiner appointed to hear the grievant(s).

My written findings and recommendation for solution are subject to approval, rejection or modification by the Civil Service Commission of the City of Houston. The Grievant is hereby informed that she has ten (10) days in which to file a written appeal requesting a review by the Civil Service Commission of the City of Houston.

Signed this the 30th day of December, 1992.

/s/_____
Luecretia Dillard
Grievance Examiner

EXHIBIT A-3

CITY OF HOUSTON
PERSONNEL DEPARTMENT

Post Office Box 1562
Houston, Texas 77251-1562
713-658-3701

May 18, 1993

Ms. Debbie Benningfield
21818 Musket Run
Hockley, Texas 77447

Dear Ms. Benningfield:

Attached please find a copy of the Grievance Examiner's written findings and recommendation for solution on your grievance which was heard on May 4, 1993. Pursuant to Section 143.131 of Chapter 143 of Local Government Code, please be advised that you or your department head have ten calendar days from the date of receipt of the attached to file a Step IV grievance form if either of you are dissatisfied with the proposed solution.

Should you or your department head decide to file a Step IV grievance, the case will be reviewed by the Civil Service Commission based upon the transcript, the demonstrative evidence offered and accepted at the Step III hearing and the findings and recommendation of the Grievance Examiner. If you or your department head fail to timely file a Step IV grievance form, the solution is considered accepted.

If you have any questions, please contact me at 658-3745.

Sincerely,

/s/_____
Roland Bienvenu
Personnel Specialist

RB:ma

cc: Alice C. Perrenot, Sr. Personnel Administrator Chief Sam Nuchia, Police Department Sgt. Tom Jennings, Police Department Brian Begle, Assistant City Attorney Jan Rich, HPOA File FY93-CP-25

GRIEVANCE EXAMINER FOR OF CLASSIFIED EMPLOYEES OF THE CITY OF HOUSTON	)	IN THE MATTER
	)	**CASE NO.**
	)	**FY93-CP-25**

WRITTEN FINDINGS AND RECOMMENDATION FOR SOLUTION

On March 22, 1993, Ms. Debbie Lynn Benningfield, Employee Number 53865, who is classified as a Fingerprint Classifier II in the Police Department of the City of Houston. requested a hearing before a Grievance Examiner for Classified Employees of the City of Houston pursuant to the Grievance Procedure established by Ordinance No. 77-1726. I have reviewed all of the jurisdictional requirements and found everything to be in order.

A full and complete hearing was held before me on May 4, 1993.

Ms. Benningfield was represented at the heating by Ms. Jan Rich, Staff Attorney for the Combined Law Enforcement Associations of Texas: and by Ms. Joanie Bain, of the law firm of Nelkin and Nelkin. The Department was represented by Mr. Brian Begle, Assistant City Attorney; and Assistant Chief Jerry Jones. Appearing as w/messes were the Grievant; Ms. Joan S. Anderson, Ph.D.; Ms. Peggy Frankhouser, Latent Print Examiner for the Houston Police Department, retired; Chief Jones; Mr. A. Wade Runnels, Administrator, Identification Division; Mr. Walter Stairhime, Latent Print Examiner; Mr.Harry Hope; Ms. Anne Hebert,

Sergeant, Internal Affairs Division; Mr. Dermis Caner. Sergeant, East Command; and Mr. Richard Pfeil, Supervisor, AFIS Section.

Also in attendance at the hearing were Mr. R T. Fleming, Assistant Administrator, Identification Division, Houston Police Department and Mr. Roland Bienvenu, Personnel Specialist, Employee Relations Division. Personnel Department of the City of Houston.

Ms. Benningfield contends that the Department improperly issued a written reprimand for an incident that occurred between August and August 7, 1992, in which she failed to comply with Departmental rules and regulations regarding reporting for duty and conduct and behavior. In resolution of her grievance, Ms. Benningfield requests that the written reprimand be removed from her personnel file.[11]

Evidence submitted indicates that the Grievant left her job without permission on August 5, 1992, and failed to report for duty on August 6-7. 1992. She also failed to call in to report her absence. A missing persons report was filed which indicated that the Grievant had left her office after an argument with a co-worker. At the hearing the departure, failure to report for duty and failure to call in were referred to as the "AWOL" incident. The precipitating incident occurred on August 5, 1992, during which the Grievant was

---

[11] A separate opinion dated December 30, 1992, was issued in the related matter, Case No. FY93-CP-15, arising out of the same facts.

said to have used profanity in response to a comment from a co-worker, Mr.Harry Hope.

According to Mr. Hope's testimony, the Grievant had stopped to talk to Bob Thomas about problems on the night shift with the Automated Fingerprint Identification System (AFIS), because the Grievant's position was AFIS Manager. Mr. Hope testified that as the Grievant walked by in a flower-printed dress, he told her to "shake them flowers." The Grievant apparently not in a mood for such jocularity, responded something to the effect. "Leave me alone. I'm sick." Mr. Hope testified that the Grievant than left the office. The next day the Grievant was not at work and had not left a message on voice-mail indicating she would be absent. Such behavior by the Grievant was inconsistent with how she handled prior absences as she had always notified the Department in the past. Mr. Hope received an oral counseling for the incident.

Dr. Joan Anderson is a clinical psychologist in private practice, and has been seeing the Grievant on a professional basis about every other week since August 1992. Dr. Anderson described the Grievant as being in generally good mental health; however, in her professional opinion, the Grievant exhibits the symptoms of major stress that are work-related. She identified the symptoms as teary, upset, anxious depressed, hyper vigilant, fragmented in thought process, physically fatigued, and emotionally exhausted. Dr. Anderson did not just take the Grievant's word for the work environment, but investigated the circumstances for herself and spoke with five corroborating witnesses. In her professional opinion, this stress could cause a person to leave work abruptly and to use profanity.

Ms. Peggy Frankhouser is currently a crime scene investigator for the Montgomery County Sheriff's Department. She retired from Houston Police Department after serving for 25 years and 2 months. Prior to her retirement she was a Latent Print Examiner and worked with the Grievant. Ms. Frankhouser testified about the problems in the identification division, placing most of the blame on management practices. These problems were corroborated by Mr. Hope who detailed the dismal working conditions of the office, stating, "We had all complained about it."[12]

The Grievant's testimony indicated that problems in the identification division had been in existence for a very long time, and that she and Ms. Frankhouser had attempted to resolve those problems. Unfortunately, those attempts had been met with a great deal of resistance, according to the Grievant. A large part of the problem related to the management in the division, and the Grievant and Ms. Frankhouser had gone over their heads to the Chief of Police. The Grievant contends that the stress within the identification division was almost unbearable and had caused some persons to leave on disability. The situation is exacerbated by the fact that the Grievant's job as a Class B officer is a restricted technical assignment, and she cannot transfer to another assignment.

The Grievant admits she did not have advance permission to be absent, but testified that she believes the written reprimand should not have been issued because she

---

[12] Mr. Hope also stated, "We were the only office that had piss dripping from the ceiling."

was already punished by not being paid for the time she was not at work. At the time of the incident she was sick and was taking Ceclor an antibiotic for an upper respiratory infection. Her real complaint is that no one ever asked about the reason she was so stressed as to be absent without permission. She believes the absence was certainly a serious matter, but should have been treated as any other medical situation.

The Grievant requested that Internal Affairs investigate her complaints, but initially the investigation was performed within her chain of command. She requested that a female officer be assigned to perform a complete investigation, including the reasons leading up to her actions on August 5-7. However, Sergeant Carter of Chief Jones' staff performed the investigation, addressing only the matters.

Sergeant Hebert testified that an affairs investigation has been performed as a result of the Grievant's complaints.

As part of her investigation, Sergeant Hebert reviewed the previous investigation because one of the allegations was that it had been conducted unfairly. Sergeant Hebert testified that she found several deficiencies in the previous investigation, including contradictory statements that were not addressed or resolved. She also testified that in her experience the only time discipline has been imposed for profanity is when it has been directed to citizens.

RECOMMENDATION FOR SOLUTION

The central issue in this case is the effect of the Department's policy concerning the pay treatment of the Grievant for the AWOL incident and its relationship, if any.

to the discipline imposed on the Grievant for being absent without prior permission and for using profanity.

Appearances and perception are common areas for problems in the area of employee relations. According to the managers for the Department, there was no choice but to dock the Grievant's pay for the incident in August, 1992, and that docking the pay was not disciplinary. Perhaps discipline was not the intent of the policy, but in its application, the policy becomes punitive under the circumstances of this case. The appearance that the action is punitive arises immediately upon the employee's receipt of the paycheck; that appearance is further reinforced upon the rendition of the written reprimand.

Is the appearance accurate that docking the pay is punitive? Although the argument that the pay treatment policy, is neutral and non-disciplinary has some appeal, when examined logically, the argument lacks substance The reason that the policy, cannot be neutral is that the supervisor must first decide how to classify the absence. As General Order 300-7 states, "A supervisor may grant, at his discretion, a member's request for compensatory time off with less than two days notice if the absence will not interfere with the division's functional responsibilities." In this case, there is no evidence that the Grievant's absence interfered with the division functional responsibilities. Thus, the key decision was whether to use the term AWOL or use discretion and grant either compensatory, time off or emergency vacation. Using the term AWOL automatically sets the forces in motion to impose punitive effects, i.e. docking the pay.

"In this particular instance, the decision to classify the

absence as AWOL was made by Mr. Runnels before an investigation was .initiated. He had already decided to show the Grievant as AWOL and did not accept the reasons for the absence.[13] He knew that her pay would be docked. Mr. Runnels' explanation is that if he had given her time off with pay then it would have been the equivalent of approving the incident. Stated the other way around, because he could not approve the incident, he classified the absence in such a way that the Grievant could not be paid for the time off. That is a value judgment that has punitive consequences.

The decision becomes questionable in light of the overall circumstances of the work environment. The Grievant had been ill for some period of time before the incident, and even announced as part of the conversation with Mr. Hope that she was sick. This fact and the stress of the work environment seem to have been ignored when classifying the absence. However, this is not to suggest that the Grievant is without fault for the incident.

Indeed, her actions were irresponsible and deserving of some discipline. Had the absence been compensated and the written reprimand or even a short suspension imposed, this Grievance Examiner most likely would leave that discipline intact. But the Grievant's pay was docked, and the written reprimand was not issued in a vacuum, in spite of the Department's desire to distance the pay treatment issue from the discipline issue. In my opinion, the pay treatment in this

---

[13] Mr. Runnels, however, did testify that had Ms. Benningfield been found unconscious he would not have carried the absence as AWOL.

instance is the functional equivalent of a suspension without pay and thus,; the harsher discipline when compared with the written reprimand. Its my recommendation that the written reprimand for the AWOL incident be removed.

The profanity issue cannot be ignored, though, and the written reprimand was issued in part for the profanity used in the workplace. There is credible evidence that others have been disciplined for similar conduct. Therefore, the Grievant is due similar discipline. It is my recommendation that the written reprimand be reduced to a verbal reprimand for the use of profanity.

The issue concerning the Grievant's title change is not before me and I do not address that matter.

My written findings and recommendation for solution are subject to approval, rejection or modification by the Civil service Commission of the City of Houston. The parties are hereby informed that there are ten (10) days in which to file a written appeal requesting a review by the Civil Service Commission of the City of Houston.

Signed this the 17th day of May, 1993

/s/_____
Luecretia Dillard
Grievance Examiner

APPENDIX K

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[March 21, 1996]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT, Intervenors/Plaintiffs,	)
v.	)CIVIL ACTION NO.)H-95-5473)(JURY DEMANDED)
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD I. PFEIL, A. WADE RUNNELS, CO. BRADFORD, ROBERT T. FLEMING AND J. R. JONES Defendants.	)

AFFIDAVIT OF PAMELA M. GRANT

Affidavit of Pamela M. Grant

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared PAMELA M. GRANT, being by me duly sworn, upon her oath deposed and stated as follows:

1. "My name is Pamela M. Grant. I am of sound mind, over eighteen years of age, capable of making this Affidavit, and I am personally acquainted with and have personal knowledge of the facts in this case, including those set forth in Plaintiffs Response to Defendants' Motion for Summary Judgment. I am an intervenor/plaintiffs in the above-entitled and numbered civil action, and as such I am duly authorized to make this Affidavit. All of the facts contained herein are within my personal knowledge and are true and correct.

2. "I began my employment with the Houston Police Department and became a sworn classified Class B peace officer on November 27, 1977.

3. "Each time a female officer attempted to speak out against the discriminatory and retaliatory treatment, she was met with retaliation. I was falsely accused of making a 'bum identification'. A bum or misidentification is an erroneous identification in which the officer attributes a fingerprint to the wrong person, resulting in a contaminated criminal history, or an arrest record being attributed to the wrong person. Men who made bum identifications often received no discipline. Several women accused of

making bum identifications were terminated. I proved that the fingerprint cards for which I was accused of making a bum had been tampered with, yet I received a written reprimand which Runnels now denies issuing. The card had nine (9) fingers of one person, but the tenth print was from someone else.

4. "Fleming and I had engaged in a personal relationship outside the department for several years, in the late 1970's and early 1980's. I ended the relationship when I was informed by Fleming that he had sexually molested my then nine (9) year old daughter. I threw him out, and in response, he put his gun to his head, while standing in the front yard, and in front of my daughter, and threatened to 'blow his head off.'

5. "Runnels was the only person other than Fleming and myself who knew of the personal relationship and the reason for its sudden ending. Runnels therefore knew of the emotional strain that would result from placing me under Fleming's supervision. Armed with this knowledge, Runnels assigned me to Fleming's supervision. I was the only officer classified as a Fingerprint II assigned to report to the Assistant Administrator (Fleming). All other FPHs, except Benningfield, reported to ID Officer Supervisors. I was assigned to report to Fleming in 1989 after I filed my first EEOC complaint, complaining of retaliation by ID Officer Morris, which Runnels refused to address, after I filed a grievance complaining of Runnels' discriminatory seniority practices. Instead of disciplining Fleming or referring him to the APC to determine his psychological fitness for duty,

Defendants reported me to Harris County Children Protective Services as an unfit mother for failing to report the child abuse.

6. "Fleming and Runnels claim that I requested that I be assigned to Fleming supervision. This is absolutely incorrect, and a complete fabrication.

7. "Because of Fleming acts against my daughter and the nature of our breakup, I could not face Fleming on a day-to-day basis, and could not stand to see him while trying to work at my desk. To facilitate the fulfillment of my duties, I scavenged the excess supply room and found some small partitions. I installed the partitions around my desk forming a small, make-shift cubicle. Aware that these partitions gave me comfort, and knowing of the history between Fleming and me, Runnels gleefully removed the partitions, mocking me in front of the other members of the division.

8. "On February 8, 1991, I suffered an emotional breakdown while on duty. Benningfield and Frankhouser witnessed the incident. On February 28, 1991, I filed an injury on duty report as required by the Department. Attached hereto as Exhibit 1 is a true and correct copy of the HPD policy requiring the filing of an injured on duty report, which was produced by Defendants are part of the business records of Defendant. Shortly thereafter, David Bell, the attorney representing the City workers' compensation carrier, began an investigation of my breakdown. I gave a statement to David Bell on March 14, 1991. In my sworn statement, I again complained

of discrimination with in the ID.

9. "In April 1991, the Assistant Chief presiding over the ID, Assistant Chief Yorek, began an investigation of the ID at the direction of then Chief Elizabeth Watson. This investigation was initiated based upon my injury and complaints from other ID employees. The investigation referred to by the Department as the "Management Review" was the fourth investigation of the ID. Sergeants Harness and Weaver were assigned by Assistant Chief Yorek to conduct the 1991 Management Review. Sergeants Harness and Weaver took tape-recorded interviews from several members of the Division, including Benningfield and Frankhouser. Later, I gave a statement to Weaver about problems with criminal histories. In my statement, I complained about retaliation in the department, and reported contaminated criminal history records within the Division.

10. "Male officers within the Division who made erroneous or bum identifications were not receiving discipline, while female officers were being terminated. Contaminated criminal histories were not being removed from the files or in some instances, accurate criminal histories were being changed merely by the complaint of the citizen. Benningfield, Frankhouser, and I tried to offer documentation to show the serious contamination of HPD's criminal histories as well as the discriminator and retaliatory treatment; however, Sergeants Harness and Weaver refused to review the documentation.

11. "On March 7, 1991, I was released to return to work half-days pending further evaluation by my doctors. After only a few days on the job, I was forced to leave again, and HPD's Psychological Services Unit ordered that I not return to work for an indefinite period of time. Shortly thereafter, I was referred to the Administrative Personnel Committee (APC) for evaluation. The APC is a committee which evaluates an officer's mental fitness, generally in cases involving alcohol or substance abuse or instances of misconduct on the part of the officer.

12. "On July 17, 1991, I requested to be assigned to a vacancy in the Photo Lab, which was outside the ID, or to be assigned to the Police Academy. On August 1, 1991, I was released to return to work, with the caveat that I not be assigned to the ID.

13. "On July 16, 1991, a competitive examination for the vacant ID Officer Supervisor positions was given. I took and passed the exam. Only one (1) other person, a male, passed the exam. At least one (1) of the vacancies for which the exam was given had been vacant for over twenty-four (24) months, but Defendants refused to request and test for the position. Had the exam been given at the time the vacancy became open, the male officer who passed the exam would not have been qualified to sit for the exam because he did not have enough seniority. Thus, by deliberately obstructing the exam, Defendants made it possible for a male to sit for and take the exam. Runnels then assigned the Photo Lab position to him, instead of me.

14. "In August of 1991, a City of Houston Risk Management Group convened to consider assigning me outside the ID so that I could return to work. David Bell, Paul Clark, Captain Roy Chandler, Sergeant William Weaver, and R. T. Fleming attended. It was recommended that I be assigned to the Police Academy so that I could be removed from the supervision of Runnels and Fleming. Attached hereto as Exhibits 2 and 3 respectively, are letters from Runnels and Fleming admitting to these recommendations, which were produced by Defendants in discovery as business records.

15. "From February through August of 1991, I had remained on injured on duty status because Defendants had refused to approve any of the available assignments outside of the ID. Departmental policy requires that division managers keep injured employees informed of procedures necessary to renew an injured on duty status. Injured on duty pay expires after one (1) year, unless an extension is granted and approved. Thus, on February 8, 1992, my injured on duty pay expired, unbeknownst to me. I continued to receive pay through March 1992, due to the fact that I had accumulated vacation, overtime, and sick leave prior to my injury, but the paychecks which I received did not evidence that I was being paid vacation and sick time.

16. "On March 22, 1992, Runnels received written instructions from the HPD Personnel Division informing him of the procedure for requesting the

extension of the my injury on duty. Rather than contacting me directly, Runnels allowed the remainder of my vacation and sick time to expire, before instructing Fleming to tell me how to request the extension. Runnels was fully aware that contact with Fleming was extremely intimidating and humiliating to me.

17. "On April 15, 1992, Fleming telephoned me at my residence telling me that I would not receive a paycheck for April 15, 1992, because I failed to write a letter requesting an extension of my injured on duty.

18. "On May 21, 1992, I met with Jones, and gave him two (2) letters he had requested one requesting an extension of the injured on duty status and the other giving a proposed resolution to my status that being promotion as required by state law, an assignment to the Photo Lab. Attached hereto as Exhibit 4 is a hue and correct copy of the letter giving the proposed resolution to my status.

19. "On June 10, 1992, Jones telephone me and told me to report to his office for a meeting on June 11, 1992, at 1:30 p.m. He did not tell me that I was going to be relieved of duty. That same day, I telephoned HPD's Personnel Division regarding my pending request for an extension of injured on duty status, and was informed that it had been approved by Personnel, and was going to City Council for approval. That night, at approximately 10:00 p.m., Lieutenant Kelly Smith from IAD called me at home, and informed me that I was to report to IAD at 9:00 a.m. the next morning to

be relieved of duty. Lieutenant Smith refused to inform me of the basis for being relieved of duty. Devastated by Lieutenant Smith's call, I attempted to commit suicide.

20. "At approximately 3:00 a.m. on June 11, 1992, I was admitted to the Intensive Care Unit at Cypress Fairbanks Hospital. Lieutenant Kelly Smith, learned of the incident, went to the hospital and attempted to force entrance. Lieutenant Smith was prevented from reaching me by hospital officials.

21. "For an officer to be relieved of duty there must be evidence of misconduct, the officer must be notified of what the allegations are leveled against her, and be given an opportunity to clear her name either before or lifter being relieved, depending on the severity of the infraction. Although I was relieved of duty, I was never given these opportunities.

22. "I had not been permitted to return to work since February of 1991, so obviously I could not have been guilty of any misconduct in the interim, and none had been reposed. In fact, I was under house arrest for the entire six (6) months I was relieved of duty. There was no justification ever given for relieving me of duty.

23. "A few days later, I met with Lieutenant Smith to be relieved of duty. Smith demanded that I sign a letter stating that I was being relieved of duty for misconduct, which, was not specified. I refused to sign the letter because I had not been informed of any misconduct. Lieutenant Smith then obtained a revised

letter which simply stated that I was being relieved of duty without any explanation. I also met with Jones, who presented me with orders to report to the office of Dr. Cox for psychological testing and evaluation.

24. "During my psychiatric evaluation with Dr. Cox, I was repeatedly questioned about the final straw leading to my breakdown of February, 1991. Finally, I broke down and informed Dr. Cox that it was the removal of the partitions, which I had placed around my desk. These partitions shielded me from Fleming.

25. "On June 29, 1992, I received a 48-hour notice from IAD ordering me to provide a written explanation as to why I had not been able to surrender my badge when I was relieved of duty. The badge had been taken away from me by Runnels several years before, along with those of two (2) other employees. Runnels told me that the badge had been issued to me by mistake.

.26. "Rowe and I were peace officers in the State of Texas for five (5) years without having badges. In spite of written verification that Runnels took my badge, the IAD complaint against me was sustained.

27. "On August 6, 1992, Nuchia approved another 48-hour notice of intent to discipline me which demanded that I sign a release for my medical records from Cypress Fairbanks Hospital for an investigation of my attempted suicide.

28. "Eventually, Dr. Cox, the Baylor psychiatrist on

contract with the City of Houston, confirmed that I was suffering from post-traumatic stress disorder that was related to the harassment and retaliation in the workplace. Dr. Cox recommended a medical retirement, but certified me as fit for duty in any other law enforcement agency.

29. "On December 9, 1992, I was notified that I would be promoted to the ID Officer Supervisor position for which I had tested for in 1991, and that the promotion would be backdated to September 21, 1991. I had not received any pay since February, 1992, even though I was purportedly relieved of duty with pay by Nuchia's June 10, 1992 Order. Despite the retroactive promotion to the vacancy that had existed since *1989,* I was not assigned to the opening in the Photo Lab which would have allowed me to return to work. The City also withheld the difference in pay that I was entitled to as an ID Officer Supervisor from September 1991, through the date of promotion. If I had been promoted in September 1991, as I should have been, the promotional eligibility list for that position would have been exhausted.

30. "On January 6, 1993, Nuchia notified the Texas Commission on Law Enforcement Standards and Education (TCLEOSE) that my certification as a law enforcement officer should be terminated. The notice was purportedly based upon the September 8, 1992 report of Dr. Michael Cox, HPD's psychologist; however, Dr. Cox certified me as "in satisfactory psychological and emotional health to be licensed [as a peace officer] and to be appointed [as a peace

officer], by the requesting agency (TCLEOSE)." The only condition in Dr. Cox's report was that I could not return to the Houston Police Department. By terminating my certification Nuchia prevented me from ever seeking employment in any other law enforcement agency.

31. On June 17, 1993, less than 180 days from Nuchia's revocation of my certification, I filed my EEOC charge.

32. "I joined this suit as an intervenor/Plaintiff on April 5, 1994.

"Further, affiant sayeth not."

/s/_____
PAMELA M. GRANT

SUBSCRIBED AND SWORN TO before me by Pamela M. Grant this 21 day of March, 1996

/s/_____
Mackwell Hickerson II
Notary Public in and for
the State of Texas

My Commission Expires: 9-12-99

EXHIBIT B-1

HOUSTON POLICE DEPARTMENT
Personnel Procedures Manual

SUBJECT: WORKERS COMPENSATION - ALL

DEFINITION: Workers Compensation benefits are provided by the City of Houston under the provisions of state law and local ordinances. Employees injured while on the job are, in most cases, eligible for compensation. This is sometimes referred as Injured on Duty". In rare instances, illness contracted as a result of the job conditions may be covered but in most cases the illness must result from an injury.

USAGE: The City of Houston is self-insured for Workers Compensation benefits; thus costs of providing such benefits are borne by the City in its annual budget. The City contracts with an outside firm to service the benefits, thereby assuring objectivity and compliance with state law. In most cases, employees eligible for Workers Compensation Benefits are also eligible for Injury Leave through the City's Personnel Director. The City also, by ordinance, adopted the policy of full compensation, whereby an employee is given full salary while unable to work even though Workers Compensation benefits are less.

REFERENCE: Industrial Accident Code; City Code 2-53 through 58; j2-169(f)(2)

PROCEDURE:

Notice of Injury: Employees who are injured while in the

course and scope of their employment are required to report such injury immediately. Course and Scope of Employment means that the injury should be the result of the employee's actions while on the job or the result of actions over which the employee had no control, but no necessarily actions which the employee is forbidden or advised not to do. Injuries as a result of horseplay or outright carelessness will probably not be covered, but must be reported.

> NOTE: Coverage for sworn officers injured while in the employ of a third party (extra-employment) are often covered by the City's Workers Compensation, provided that the injury resulted from actions taken by the officer which are part of his/her sworn duty or obligation, but not actions taken as a result of a request or requirement by the third party (house rule), or by such actions as the officer would not have performed in an on-duty capacity. Doubtful cases should be submitted for consideration.

As a practical matter, the injury should be reported to the employee's immediate supervisor. Any supervisor becoming aware of an on-job injury should immediately take certain steps:

1. Arrange for prompt medical treatment, if required.

If it is expected that the employee will lose time from work, the supervisor, based on the facts disclosed in the report, should recommend whether injury Leave should be granted for the absence. Attached to the report should be copies of

the forms previously sent direct to the Personnel Division.

Changes in Status: During the course of the absence or while medical treatment continues, the supervisor should maintain communication with the employee. Any change in the facts originally reported should be noted and a Supplemental Report (Form) should be submitted directly to the Personnel Division Records Section as soon as possible. This includes death or final recovery from injuries. The Supplemental Report is not necessary if all information in the original First Report was complete and correct. For example, an employee who is injured but loses no time or returns to work prior to submission of the Employers First Repot would be shown as returned to work on the original repot, and no supplemental report is needed.

Death From Injuries: In the event an employee dies from injuries sustained while in the course and scope of employment, such information should be immediately transmitted (by phone or in person)to the Personnel Division Records Section, or at the start of the Section's next working day. In such cases, the supervisor making the report should also attempt to learn of the employee's surviving family members and their ages and where they can be reached.

In case of death while in the line of duty, copies of the offense report and/or accident report must be made available as soon as possible in order to support the claim for benefits to surviving family members.

Return to Work: When the employee returns to work from an absence caused by an on-job injury, a Supplemental Report (Form) should be submitted, unless the absence was so short

that it was noted on the original report. See also procedures under Injury Leave for return from such leave.

Light Duty: If the attending physician so directs, the employee can return to work on "light duty", meaning there is some restriction on what physical work can be expected. Supervisors should consult with the physician to clarify his instructions, and should comply with them as closely as possible. It should be noted that, when the physician feels the employee is able to return to work in any capacity, the department is obligated to accommodate the request. Once the employee has returned to work, either on light duty or full duty, the required forms must be submitted.

Re-injuries: Occasionally, an employee suffers an injury which is related to a previous, on-duty injury. Supervisors should make note of this on all forms submitted.

Questioned Injuries: In the event a claim of injury is questioned by the investigating supervisor, and it is determined that the injury either did not occur on the job (as defined above) or did not occur at all, the supervisor is still required to submit all related forms and statements. But, in such cases, the Supervisor's Injury Investigation Report Form, clearly indicating that the injury was not found to be suffered in the course and scope of employment. The personnel Division Records Section Supervisor should also be advised immediately by telephone of such findings so that the information can be relayed to the Personnel Department Workers Compensation Division.

EXHIBIT B-2

CITY OF HOUSTON
INTER OFFICE CORRESPONDENCE

TO: J.R. Jones, Assistant Chief Technical Services Command

FROM: A. Wade Runnels, Administrator Identification Division

DATE: May 19, 1992

SUBJECT: Summary of Injury on Duty Pamela M. Grant, PPC II Employee #61027

The following is in regard to your inquiry concerning the Injury on Duty (IOD) of Ms. Pamela M. Grant. On February 28, 1991, I was officially notified by Ms. Grant that she had sustained an IOD. This injury alleged occurred as a result of accumulated stress in the work place which culminated in an incident involving myself on February 9, 1992.

In view of the nature of the injury and my involvement in the incident, Mr. R.T. Fleming, Assistant Administrator, was given the assignment of investigating the incident and to make a recommendation concerning the injury on duty. On March 4, 1991, he submitted correspondence stating that if all or part of the injury was job related that he would recommend she be granted IOD.

Mr. Fleming continued to receive physician's statements until the last one submitted on July 31, 1991. This statement was from a private psychologist and states that the Major

Depression was now in remission. Further, that she was approved for full time work if assigned to a different division. As a result, it is my understanding that Mr. Fleming, Captain Chandler, Mr. Paul Clark, Mr. David Bell, and Sergeant Weaver held a meeting in which it was recommended that Ms. Grant be placed in the Police Academy as a solution to the problem. During a later meeting with Chief Bradford and Chief Contreras, Mr. Fleming and I were told they were not in concurrence with the recommendation. Further, that future consideration of this matter would be handled at the command level. I was, however, instructed to continue to carry her IOD on the absentee report in the future.

During a division managers meeting on March 22, 1992, in Chief Bradford's office, all the division commanders were instructed to review the IOD policy for injured employees off one year or more and comply. I did so and reported the procedures to follow. I asked if I should notify Ms. Grant to begin the process. He instructed me not to pursue it as this was a unique situation and wanted to brief Chief Nuchia on the matter. Approximately one or two weeks later, I was contacted by Matt Perales, Personnel Division, and was asked the status of Ms. Grant's IOD. I informed him of my instructions form Chief Bradford and stated I would convey our conversation to him. I did so and was then instructed by Chief Bradford to contact Ms. Grant and have her submit the required paper work requesting an extension of her leave.

Mr. Fleming called Ms. Grant and left a message on her recorder. Approximately 15 minutes later, Mr. Terry Wood, Ms. Grant's husband, contacted Mr. Fleming whereby he was informed that the one year anniversary of Ms. Grant's injury had elapsed and that she must request an extension along with

providing physician's report.

After speaking with Mr. Fleming, Mr. Wood contacted myself and I agin reviewed the necessary steps which needed to be taken for a request to extend her IOD. Mr. Wood informed me he was under the opinion that a doctor's statement was not required since the July 31, 1991 statement released her to return to duty. However, he did state that Ms. Grant was seeing the doctor in the near future and could obtain the required documentation.

Should additional information be needed, please advise.

/s/_____
A. Wade Runnels, Administrator
Identification Division

EXHIBIT B-3

CITY OF HOUSTON
INTER OFFICE CORRESPONDENCE

TO: J.R. Jones, Assistant Chief Technical Services Command

VIA: A. Wade Runnels, Administrator Identification Division

FROM: R.T. Fleming, Asst. Admin. Identification Division

DATE: May 19, 1992

SUBJECT: Summary of Injury on Duty Pamela M. Grant, PPC II Employee #61027

The following is a synopsis of the events concerning the Injury on Duty sustained by Ms. Pamela M. Grant, FFC II, Employee #61027 on February 8, 1991.

On February 8, 1991, Ms. Grant sustained a psychological injury on duty.

On February 12, 14, 15, and 19, 1991, Ms. Grant was seen by Dr. Beverly Nichols, Psy.D., Staff Psychologist with the Houston Police Department.

On February 28, 1991, I was notified she was requesting an Injury on Duty. The injury forms were completed, faxed to the Workmen's Compensation Office, and the original hand carried to Police Department Personnel.

On March 7, 1991, a letter was received from Ms. Grant;

and, from March 7-20, 1991, Ms. Grant returned to work for one-half (1/2) days. During this time, on March 11, 1991, the supervisor's letter was forwarded to the Chief of Police.

On March 12, 1991, I notified witnesses that Mr. David Bell, Attorney at law and Investigator for Workmen's Compensation, would be in the division; and, they would be available for interviews on Thursday, March 14, 1991 and Monday, March 18, 1991.

On or about March 20, 1991, I received a call from Mr. David Bell stating that he was recommending to Workmen's Compensation that the claim was compensatory. I then received a call from Ms. Brenda Carr of Adjusco that Ms. Grant was ruled Injured on Duty and all medical expenses and time would be covered.

From March 5 - July 31, 1991, Ms. Grant submitted Physician's reports as required.

On August 1, 1991, Ms. Grant submitted correspondence to return to work with a Physician's Report attached stating in any division except the Identification Division.

I was instructed to attend a meeting called by Mr. Paul Clark; attended by Mr. Bell, an attorney from City Legal; Captain Chandler, HPD Personnel; and Sergeant Bill Weaver. The purpose of this meeting was to return Ms. Grant to duty in compliance with her doctor's return to duty. It was the consensus and recommendation of this group that she be reassigned to the Houston Police Academy.

Approximately a week or two later at a meeting called by

Assistant Chiefs Bradford and Contreras, Mr. Runnels, Administrator of the Identification Division, and I were made adamantly aware Ms. Grant would not be assigned to the Academy; that they were going to reconvene the Paul Clark group; and they would handle Ms. Grant from this point forward up to and including ordering her back to work in the Identification Division. From this conversation, which lasted no more than 2 or 3 minutes, I drew the conclusion that this was no longer a division issue and would be handled from that time on at the Command level. We were instructed to carry her Injury on Duty until further notice. This brief time was spent on this issue and an hour or two was spent on the reorganization and civilization.

From the August meeting with Assistant Chiefs Bradford and Contreras, there has been no contact with Ms. Grant. It was my understanding this was being handled by personnel under Chief Contreras' direction.

As February, 1992 approached, I reminded Mr. Runnels that Ms. Grant's one year anniversary was approaching, and he needed to contact the Assistant Chiefs for direction.

I was instructed by Mr. Runnels to contact Captain Chandler in personnel for direction, and was told the request for extensions of Injury on Duty must be instigated by the employee not the division. This information was given Mr. Runnels.

On April 13 or 14, 1992, I was at the Police Academy when contacted by Mr. Runnels stating I was to contact Ms. Grant and inform her that she needed to request an extension on her Injury on Duty status. I called her residence and left this

message on her recorder. I was then paged by Mr. Terry Wood, (her husband), Superintendent, Communications Maintenance, and he stated her position was she was only waiting for assignment to return to work; therefore, she was not out on Injury on Duty. I stated to him this was not within my authority to comment on their position; and, I was only passing on the instructions I had been given.

/s/_____
R.T. Fleming, Asst. Admin.
Identification Division

EXHIBIT B-4

Sam Nuchia
Chief of Police

Pamela M. Grant
Fingerprint Classifier II
Identification Division

Via: J.R. Jones, Assistant Chief
Technical Services Command

May 21, 1992

Proposed Resolution to
IOD Status

Chief Nuchia, an incident occurred on February 8, 1991, in the Identification Division that resulted in my filing an injured on duty report. Previous to this incident, many other incidents had occurred over the years.

My doctor returned me to work on July 31, 1991, with the condition that I not be returned to that division. This was done for my well-being.

As a proposed resolution to this problem, I would like to return to work and be reassigned in the Class B service, with my lost time and wages restored. In order to not create any further problems, such as working out of job title description, I would like to be promoted, as I am currently first on the standing promotional list for Identification Officer Supervisor. Currently, there are three funded positions in Assistant Chief Jones' command. This job title description is consistent with positions already assigned in Assistant Chief Jones' command (Crime Lab, Photo Lab, Firearms).

Sir, I respectfully request that this issue be resolved as soon as possible, as the past fifteen months have been very trying

on myself and my family.
/s/_____
Pamela M. Grant
FPCII

APPENDIX L

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[March 21, 1996]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT,	)CIVIL ACTION NO.
	)H-95-5473
Intervenors/Plaintiffs,	)(JURY DEMANDED)
v.	)
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD J. PFEIL, A. WADE RUNNELS, C. O. BRADFORD, ROBERT T. FLEMING AND J. R. JONES	)
Defendant.	)

AFFIDAVIT OF PEGGY FRANKHOUSER

Affidavit of Peggy Frankhouser

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared PEGGY FRANKHOUSER, being by me duly sworn, upon her oath deposed and stated as follows:

1. "My name is Peggy Frankhouser. I am of sound mind, over eighteen years of age, capable of making this Affidavit, and I am personally acquainted with and have personal knowledge of the facts in this case, including those set forth in Plaintiff's Response to Defendants' Motion for Summary Judgment. I am an intervenor/plaintiff in the above-entitled and numbered civil action, and as such I am duly authorized to make this Affidavit. All of the facts contained herein are within my personal knowledge and are true and correct.

2. "I began my employment with the Houston Police Department on September 11, 1967, and became a sworn classified Class B peace officer on November 11, 1972.

3. "In 1985, I complained of discrimination and hostile working conditions in Identification Division under the administration of former Administrator Audra Runnels.

4. "In or around 1985, I filed a grievance regarding sick leave. Other females in the Department, including Marilyn Mokwa and Claudia Sumrall, also filed successful grievances.

5. "Mokwa filed a workers compensation claim. Benningfield and I each gave a statement to the investigator, Diana Ball, regarding the atmosphere in the department. Afterwards, Ms. Ball told me that she had spoken with Bradford and that he refused to listen.

6. "Immediately after Mokwa resigned, Defendants changed the policy in the ID so that no ID Officer Supervisors were assigned to night shift. All male sworn ID supervisors were assigned to the day shift.

7. "I requested permission to attend a retirement seminar at the Houston Police Academy, which would have been at no cost to the City. Runnels and Fleming refused this request, claiming that three (3) or more officers cannot attend the seminar at the same time. Defendants had routinely allowed three or more males to attend training in the past, and in fact allowed three males to attend a seminar together in 1995, during the pendency of this action. As a result of my request, Fleming then revoked permission which had previously been granted to the two males to attend the seminar, and told them that their request was denied because of my complaints.

8. "On May 21, 1991, I was investigated for allegedly taking unauthorized vacation when I left the division for two hours.

9. "On January 10, 1992, fearing further retaliation, Benningfield and I submitted a written request to meet with then Police Chief Elizabeth Watson to discuss the

Health and Welfare of the Identification Division and its Employees, a letter which addressed the discrimination, retaliation, contaminated criminal histories and mismanagement in the ID. As required, Benningfield and I submitted this letter to Chief Watson through the chain of command, which required that it be submitted through Runnels and Bradford. Instead of forwarding Plaintiffs' request to meet with Chief Watson, Bradford came to the Latent Lab, and met with us personally. Bradford accused us of being troublemakers, and refused to allow us to explain. Bradford told us that he did not want to hear our problems. When we attempted to explain about the retaliation to which we had been subjected, Bradford began laughing. I became emotionally distraught and began to cry hysterically, to which Bradford smiled and responded that he "thought his presence seemed to perturb us" and left.

10. "Finally, on February 7, 1992, Benningfield and I were permitted to meet with Chief Elizabeth Watson for 15 minutes. Bradford was in attendance. At the meeting, we presented, for the first time, *Health and Welfare of the Identification Division and its Employees*. Watson told Bradford to look into the issues and respond to us.

11. "On March 2, 1992, I filed a grievance over Fleming, Runnels, and Bradford's refusal to approve the overtime for an assignment due to the Printrak acceptance contract.

12. "On March 2, 1992, Benningfield and I took a copy of

our letter titled *Health and Welfare of the Identification Division and its Employees to the* newly appointed Chief of Police, Sam Nuchia, through the chain of command. Shortly, thereafter, Fleming lowered my job performance rating ('JPR'), accusing me of being disruptive during the Management Review, doing 'comparisons' for my friends, training police cadets (which was an assigned duty I had performed for fifteen (15) years), and using profanity against Bradford. He said I called Bradford a 'fucking idiot'. In response, Runnels instructed Fleming to raise my JPR back to its previous level. Fleming responded, "Forget it, I quit!" Two days later, Fleming returned to work, and agreed to raise my JPR back to its previous level.

13. "In response to Chief Watson's direction, Bradford issued a letter allegedly in response to our letter. Bradford's letter failed to address the discrimination and retaliation or the serious problems and erroneous arrest information being added to criminal histories. Benningfield and I also advised Nuchia in writing that Bradford's response was the equivalent of no response at all. Nuchia then ordered us to send Bradford a written explanation as to which complaints his 'response' failed to address. On March 18, 1992, we sent this explanation to Bradford and copied it to Nuchia.

14. "Jones met with Classified B and C officers to advise them of the change in command from Bradford to Jones, and introduce himself. At the meeting, Jones informed me and Benningfield that any complaints

had to be addressed through the chain of command, which included Runnels and Fleming. We were thus ordered to report any complaints of discrimination or retaliation to the superiors who were doing the discriminating and retaliating. At the same meeting, Runnels informed us that he had been given a copy of our 18 page letter that had been provided to Chiefs Watson and Nuchia in February and March of 1992. The only persons who could have provided Runnels with the letter at that time were Nuchia and Bradford.

15. "Because Runnels had been given a copy of our letter, both Benningfield and I feared severe retaliation by Runnels and Fleming if we should file a complaint. We had no choice, however, as Jones had ordered that any complaints had to be filed through Runnels and Fleming.

16. "In August of 1992, Benningfield had an emotional breakdown due to the stress on the job and left the office in the middle of the shift. She did not return for several days. While she was gone, Nuchia and Jones approved the filing of a missing persons report. After the report was filed, Homicide investigators contacted Benningfield's family, causing them great alarm. No attempts were made to locate her before Defendants filed the report.

17. "In or around August, 1992, Runnels and/or Fleming stripped me of my cadet training position, which I had held for fifteen years.

18. "On December 1, 1992, Benningfield and I met with City Personnel Director, Stephanie Burkes, and Laura Peters from Risk Management. We explained that our personal health and welfare were being affected by the continued discrimination and retaliatory practices by Nuchia, Bradford, Jones, Runnels, Fleming and Pfeil. During the meeting, I again became emotionally distraught, and broke down in tears. At the end of meeting, Ms. Burkes agreed to meet with Nuchia again and explain how she had seen firsthand the affect the stress and harassment had on us.

19. "In January of 1993, I resigned from the Houston Police Department, because I could no longer endure the hostile and retaliatory working conditions. I had witnessed the retaliation against Benningfield and Grant, and the recent conduct directed against Benningfield after the 'AWOL' incident. I knew that both Grant and Benningfield had been referred to APC and accused of being mentally unfit for duty and that nothing was being done to protect them from further retaliation, and I didn't want to be put through the same thing.

20. "Runnels and Fleming had already begun a campaign to discredit me which included removing my training responsibilities, accusing me of 'having my own agenda,' of being difficult to work with, of leaving work without permission, and of by passing the chain of command. I knew that I was next in line to be discredited, humiliated, and punished.

21. "I requested and received a personal exit interview

with Nuchia. During the exit interview, I became emotionally overwrought due to the fact that Nuchia refused to take any action in response to our complaints and continued to express his intention to discipline Benningfield and Grant, rather than the persons who were responsible for their emotional injuries. During the exit interview, Nuchia indicated his knowledge of the molestation of Officer Grant's daughter by Fleming stating 'you didn't tell me about the incestuous relationships [in the ID].' At the time, I was unaware of the fact that the relationship between Grant and Fleming had ended due to Fleming's disclosure of his abuse of Grant's daughter and threatened suicide.

22. "On May 18, 1993, I filed her EEOC charge.

"Further, affiant sayeth not."

/s/_____
PEGGY FRANKHOUSER

SUBSCRIBED AND SWORN TO before me by Peggy Frankhouser this 21 day of March, 1996.

/s/_____
Mackwell Hickerson II

My Commission Expires: 9/12/99

APPENDIX I

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[March 21, 1996]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT,	)CIVIL ACTION NO.
	)H-95-5473
Intervenors/Plaintiffs,	)(JURY DEMANDED)
v.	)
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD J. PFEIL, A. WADE RUNNELS, C. O. BRADFORD, ROBERT T. FLEMING AND J. R. JONES Defendants.	)

_____/

AFFIDAVIT OF TERRY WOOD

Affidavit of Terry Wood

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Terry Wood, being by me duly sworn, upon his oath deposed and stated as follows:

1. "My name is Terry Wood. I am of sound mind, over eighteen years of age, capable of making this Affidavit, and I am personally acquainted with and have personal knowledge of the facts in thin case, including those set forth in Plaintiff's Response Defendants' Motion for Summary Judgment. I am a police officer, and have been so employed with the City of Houston for approximately twenty-two (22) years; I am married to Pamela Grant, Intervenor/Plaintiff in the above-entitled and numbered civil action. As such I am duly authorized to make this Affidavit. All of the facts contained herein are within my personal knowledge and are true and correct.

2. "In August of 1991, a City of Houston Risk Management Group convened to consider the assignment of Officer Pamela Grant outside the ID so that she could return to work David Bell, Paul Clark Captain Roy Chandler. Sergeant William Weaver, and R. T. Fleming were in attendance. Sergeant Weaver informed me that a recommendation was made that Grant be assigned to the Police Academy so that she could be removed from the supervision of Runnels and Fleming.

3. "Throughout this period, Officer Grant had remained on injured on duty status because the Defendants had refused to approve any of the available assignments outside of the ID. Departmental policy requires that division managers keep injured employees informed of procedures necessary to renew an injured on duty status. Injured on duty pay expires after one (I) year, unless an extension is granted and approved. On February 8, 1992, Grant's injured on duty pay expired, unbeknownst to her. She continued to receive pay through March 1992, due to the fact that she had accumulated vacation, overtime, and sick leave prior, to her injury, but the paychecks which she received did not evidence that she was being paid vacation and sick time.

4. "Rather than contacting Grant directly, Runnels allowed the remainder of Grant's vacation and sick time to expire, before instructing Fleming to contact Grant and advise her how to request the extension. Runnels was fully aware that contact with Fleming was extremely intimidating and humiliating to Officer Grant.

5. "On April 15, 1992, Fleming telephoned Grant at her residence telling her that she would not receive a paycheck for April 15, 1992, because she failed to write a letter requesting an extension of her injured on duty. In response, I wrote a letter to Nuchia's office requesting a meeting to discuss Grant's status, and outlining the events from February 1991. In late April, I received a response from Officer Martin of

Nuchia's office informing me that the Chiefs office was looking into assigning Grant to the position in the Crime Lab, with a 90-day extension of the injured on duty stares. Shortly thereafter, I was advised that Jones had been assigned over the technical services command (which included the ID and the Crime Lab), to replace Bradford. Officer Martin told me that the results would be favorable and that Jones had been given five (5) days to clear up Grant's situation.

6. "That same day, Nuchia wrote a letter to Bradford asking Bradford to provide him with a summary of Grant's status, and asking specifically why Grant was not allowed to return to duty and why there had been no follow-up at the division level

7. "In early May, Jones contacted me and requested a meeting Jones later requested documentation from Grant's doctor (Dr. Kopel), and a medical release from Dr. Reide. (HPD's psychological services director). Jones also told me that Dr. Reide had supported" extension of Grant's injured on duty status, on May 14, 1992, I met with Jones and told him of the investigation by David Bell, the Management Review, and the tape recordings made by Sergeant Weaver.

8. "On June 5, 1992, Nuchia ordered me to report to his office. In attendance were myself, Nuchia, Chiefs Bradford and Jones, who were all in full-dress uniform. Nuchia stated that he realized this situation was causing a great deal of stress on my family, but that Grant was an employee of the department and as such, this issue was between the department and

Grant, and I was not to interfere. The meeting lasted approximately five minutes.

9. "In my experience, it was common procedure that Police Officers were given private rooms when we attended conferences and meetings. Many male officers, including Mark Zeringue, Lief Erickson, Jimmy Shah and myself often attended out-of-town seminars, and were given private rooms. We were never required to pay any additional amount of money to do so.

"Further, affiant sayeth not."

/s/_____
TERRY WOOD

SUBSCRIBED AND SWORN TO before me by Terry Wood this 21st day of March, 1996.

/s/_____
Mackwell Hickerson II

My Commission Expires: 9/12/99

APPENDIX N

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[March 22, 1996]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT,	)CIVIL ACTION NO.
Intervenors/Plaintiffs,	)H-95-5473)(JURY DEMANDED)
v.	)
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD J. PFEIL, A. WADE RUNNELS, C. O. BRADFORD, ROBERT T. FLEMING AND J. R. JONES Defendant.	)

AFFIDAVIT OF JOAN ANDERSON, Ph.D.

Affidavit of Joan Anderson, Ph.D.

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Joan Anderson, Ph.D., being by me duly sworn, upon her oath deposed and stated as follows:

1. "My name is Dr. Joan Anderson I am of sound mind, over eighteen years of age, capable of making this Affidavit, and I am personally acquainted with and have personal knowledge of the facts in this case, including those set forth in Plaintiff's Response to Defendants' Motion for Summary Judgment. I am a licensed clinical psychologist in the state of Texas, and am personally acquainted with the Plaintiffs Officer Benningfield and Officer Frankhouser in the above-entitled and numbered civil action, and as such I am duly authorized to make this Affidavit. All of the facts contained herein are within my personal knowledge and are true and correct.

2. "In or around fall of 1992, Officer Debbie Benningfield came to me for treatment of work related stress and related injuries.

3. "From the fall of 1992, until the present, Officer Benningfield continued to see me on a professional basis to help her deal with job related stresses under which she works. After speaking with Officer Benningfield, I called Stephanie Burkes, the City of Houston personnel director, to inquire as to why the City was allowing such a hostile environment go

unremedied. Ms. Burkes admitted that the City was aware of the problems in the ID, and referred me to David Bell, the workers' compensation attorney who had investigated the Pamela Grant February 1991 incident. I telephoned and then met with Mr. Bell, and obtained from him information confirming that there had been a hostile environment.

4. "I was requested by Officer Benningfield, at the direction of HPD, to conduct an examination of Officer Benningfield and determine her fitness for duty. I contacted Assistant Chief Bradford of HPD to determine the purpose behind this examination, find out the substance of their concerns, and establish what type of tests HPD required. Assistant Chief Bradford stated that Officer Benningfield had emotional outbursts, often broke down in meetings, had lied on several issues, and was suicidal.

5. "During my evaluation, I interviewed other members of the ID. One member was Fingerprint Classifier II, Officer Larry Williams, who provided a written statement in which he described a meeting between him and Officer A. Wade Runnels which took place on the first day Officer Runnels became Administrator of the Division. During that meeting, Officer Runnels reportedly threatened Officer Williams, and informed him that all women belong under his thumb. Officer Williams also said that he had given the same information to the Management Review in 1991.

6. "In making my evaluation, at Officer Benningfield's request I contacted Doug Elder, HPOA President, and

asked him whether he believed Officer Benningfield was suicidal. He informed me that he never said she was suicidal. He stated that Officer Benningfield was paranoid about people spying on her in the work place, was irrational at time, and that he was concerned about her.

7. "I completed my evaluation within a few days of my conversation with Assistant Chief Bradford, and faxed the results of Officer Benningfield's psychological evaluation to Chief of Police Sam Nuchia's office. I found Officer Benningfield fit for duty, and did not see her as suicidal in any way. Attached as Exhibit 1 is a true and correct copy of the Psychological Evaluation and facsimile cover sheet which I transmitted to Chief Nuchia.

8. "I also spoke with Officer Peggy Frankhouser, a co-worker of Officer Benningfield and an HPD peace officer, about abuses she had suffered in the ID division of HPD. I was never asked to do an evaluation of Officer Frankhouser.

"Further, affiant sayeth not."

/s/_____
JOAN ANDERSON, Ph.D.

SUBSCRIBED AND SWORN TO before me by Joan Anderson, Ph.D., this 22nd day of March, 1996.

/s/_____
Katherine L. Borawski
My commission Expires: 3/26/97

EXHIBIT E-1

SUITE 320
4550 Post Oak Place
Houston, TX 77027
Phone: 713/622-5430
Fax: 713/622-7381

FAX TRANSMISSION

DATE: July 28, 1993

TO: Chief of Police Sam Nuchia

FAX #: 247-5193

FROM: Joan S. Anderson, Ph.D
Total Number of Pages: 5
Message: Please note changes under Assessment Techniques on page one. Thanks!

Please call Charlotte Broaddus at (713) 622-5430 if there are any transmission problems.

THE INFORMATION CONTAINED IN THIS TRANSMISSION IS A LEGALLY PRIVILEGED AND CONFIDENTIAL COMMUNICATION. IT IS INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS PROHIBITED.

JOAN S. ANDERSON, PH.D
A PROFESSIONAL CORPORATION
4550 POST OAK PLACE
SUITE 320
HOUSTON, TEXAS 77027

PSYCHOLOGICAL EVALUATION

NAME: Debbie Benningfield
SEX: Female
AGE: 37
DATE OF EVALUATION: 1992-93
OCCUPATION: HPD Officer
Fingerprint Classifier II, Grade IV
REFERRED BY: HPD Administrative Personnel Committee

REASON FOR REFERRAL:

According to Chief C.O. Bradford, Miss Benningfield has demonstrated conduct which raises questions about whether she is suitable to carry out the duties of her job or fit to carry a pistol. Such conduct was described as outbursts, breaking down during meetings, walking off of the job, and saying things that are not true.

ASSESSMENT TECHNIQUES:

History; clinical interviews; Rorschach; MMPI-2; Millon Clinical Multiaxial Inventory-II; interviews with 5 colleagues.

BACKGROUND INFORMATION:

Officer Debbie Benningfield has been a member of the department since 1975 and a sworn member, since 1978. She is a Police Officer, Class B. She is a native Houstonian, the 4th child in a sibship of 4 and the daughter of a Police Officer who is new retired. Her oldest brother is a Captain with the Houston Fire Department and her next brother a Houston Police Officer. Her 3rd brother is an electronic engineer who lives in South Carolina. Miss Benningfield has enjoyed normal or good relationships with family members although her mother died in 1979 of cancer. She attended North Harris County College for 2 years and has had continuing education at several FBI schools and others schools offering the science of fingerprints. She has never been married. Her medical history has included some surgeries and treatment for allergies but she has no psychiatric history. She takes no medications except as needed for allergies under the care of her physician. She does not drink alcohol, does not smoke cigarettes, and has no drug history. She is overweight and working on the problem. She lives alone, has normal hobbies, enjoys activities with close friends and loves her job.

Miss Benningfield first consulted me on 13 August 1992 as a result of an incident after which she went AWOL for two days. She had been ill and was in treatment with her physician and on antibiotic medication. When she returned, she found that her position had been reassigned and that she had been cited not only for AWOL but for other issues such as profanity and for having an altercation with a fellow officer. Miss Benningfield acknowledged the AWOL, denied the extent of profanity accused and denied the

altercation with a colleague. I later spoke with that colleague who, although he denied the allegation also, had sexual harassment charges filed against him. In the same time frame, Miss Benningfield discussed ongoing issues, of years duration, of what she considered to be harassment and retaliation in her division. She spoke of having made many attempts to have the situation assessed by outside investigators but to no avail. This examiner spoke personally with five of her colleagues who had known and worked with her in her division and they corroborated her perceptions.

On 25 February 1993, Miss Benningfield received a interoffice correspondence noting that her complaint about management issues would be dealt with by way of an independent audit of the Identification Division to be conducted by the Inspections Division. Other allegations relating to sexual harassment would be investigated by the Internal Affairs Division. "The memo" indicated that the department was also concerned about her personally and were therefore referring her to the Administrative Personnel Committee and recommending a psychological assessment. On 24 June 1993, Miss Benningfield was told by the APC Committee to have a psychological evaluation. She contacted this examiner who talked with Chief C.O. Bradford on 6 July 1993. Chief Bradford said that the department was concerned about Miss Benningfield for many reasons but especially because of the need to ascertain that she was in good enough psychological health to carry a pistol. Chief Bradford provided the name of two Assistant Police Chiefs who could provide other information but refused to give this examiner anything in writing regarding charges or allegations against Miss Benningfield.

This is a precis of what has occurred and it does not include the numerous attempts on Miss Benningfield's part to have her division investigated by outside sources other than the chain of command or the hearings which have been held regarding her concerns. She has felt very strongly that there has been a long history of sexual harassment, discrimination, and retaliation in her division and has refused to give up her belief that, if she continued to make efforts, someone would hear her and respond. According to her, she has always worked within the system and, although her complaints have been continual and adamant, they have, for over 10 years, been sought through proper channels. Over time, Miss Benningfield has continued to seek and obtain continuing education in her field and has been acknowledged as outstanding from other sources as well as her division evaluations.

It is this examiner's understanding from Miss Benningfield as well as from Chief Bradford that there is no question about her ability to carry out her AFIS duties. Her evaluations verify that. The question is whether she is psychologically sound enough to meet Police Officer standards regarding her mental and emotional health.

INTERVIEWS:

Miss Benningfield has been seen for 17 sessions between 13 August 1992 and 26 July 1993. Regarding use of her weapons, she has fulfilled the requirements for her yearly qualifying course, her last score being 83.8. She has never fired her weapon except during qualification rounds and has never threatened anyone with her gun. She reported never having threatened anyone with physical violence, never

having hit anyone, never having destroyed property, and never having acted impulsively with the possible exception of the AWOL incident. She has never been written-up in the department for other impulsive behaviors. She reported an incident of having "lost my cool" after receiving the APC letter but, coincidentally, had an appointment in my office some two hours later and was entirely coherent and in control at that time.

Miss Benningfield's activities outside of the office appear to be normal and her social activities within normal range with regard to her number of friends, type of activities, and ability to be alone. Having grown up in a police officer's family with an authoritarian father whom she respected, she is a person who is generally compliant but who believes strongly in the letter and the word of the law. She presents as a person who has and lives ideals as subsumed under what is right and just and who lives those morals and values. She is a strong woman, however, with unusual, tenacity and perseverance against what she sees as immoral and wrong. Of great import is the fact that, with the exception of the AWOL incident, Miss Benningfield has demonstrated flexibility and tolerance and has worked within the system.

RESULTS OF PSYCHOLOGICAL EVALUATION:

The results of the psychological evaluation show the picture of a woman with good reality testing and no thought disorder, major depression, delusional disorder, or antisocial tendencies. There was also no sign of alcohol or drug problems. She has some compulsive traits which are typically seen in the personalities of people who do work requiring

minute details such as surgeons, accountants, and laboratory workers. Tests also indicated that she has a feminine and somewhat dependent orientation and, as such, would be more likely than most to adhere to rules and regulations and to expect others to do so also. Her tests indicate that she is experiencing current situational stress but that her coping mechanisms are entirely adequate at this time to carry out her duties without being a danger to herself or others.

/s/_____
Joan S. Anderson, Ph.D

APPENDIX O

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[March 26, 1996]

DEBBIE L. BENNINGFIELD, Plaintiff,	)
PEGGY FRANKHOUSER and PAMELA M. GRANT,	)**CIVIL ACTION NO.**
	)**H-95-5473**
Intervenors/Plaintiffs,	)**(JURY DEMANDED)**
v.	)
THE CITY OF HOUSTON, SAM NUCHIA, THE FIREMEN'S AND POLICEMEN'S CIVIL SERVICE COMMISSION OF THE CITY OF HOUSTON, RICHARD J. PFEIL, A. WADE RUNNELS, C. O. BRADFORD, ROBERT T. FLEMING AND J. R. JONES Defendant.	)

AFFIDAVIT OF NORBERT LeBLANC

Affidavit of Norbert LeBlanc

STATE OF TEXAS)
COUNTY OF HARRIS)

BEFORE ME, the undersigned authority, on this day personally appeared Norbert LeBlanc, being by me duly sworn, upon his oath deposed and stated as follows:

1. "My name is Norbert LeBlanc. I am of sound mind, over eighteen years of age, capable of making this Affidavit, and I am personally acquainted with and have personal knowledge of the facts in this case, including those set forth in Plaintiffs Response to Defendants' Motion for Summary Judgment. I am a retired Police Officer, and was so employed by the City of Houston for approximately twenty-seven (27) years; I am personally acquainted with Debbie Benningfield, Peggy Frankhouser, and Pamela Grant, Plaintiffs in the above-entitled and numbered civil action. As such I am duly authorized to make this Affidavit. All of the facts contained herein are within my personal knowledge and are true and correct.

2. "During my tenure with the Houston Police Department, I worked with Debbie Benningfield, Peggy Frankhouser, and Pamela Grant, on a daily basis. I knew about and personally witnessed the harassment and discrimination waged against Benningfield and Frankhouser. In one particular incident which I witnessed, Assistant Chief Bradford called Peggy Frankhouser and Debbie Benningfield aside in the latent print room and interrogated them forcefully. As he saw that his scathing attacks were

causing emotional outbursts and were upsetting Frankhouser and Benningfield, he began to increase the force of his attacks, and started to smile. It was obvious that he was harassing them solely for his own pleasure.

3. "I supported Debbie Benningfield and Peggy Frankhouser, and recognized that they were being discriminated and retaliated against, harassed, and intimidated by the Defendants.

4. "A few men were willing to speak out against the discriminatory conduct in the department. Several times, I took Fleming aside and told him that the harassment was misplaced, unfounded, and counterproductive, and that he and other supervisors should support the women for their outstanding work. Frankhouser and Benningfield were giving more than 100%, and the department was enhanced by their work with outside agencies and success in the field, beyond the call of duty.

5. "When the few men spoke up, Runnels and Fleming retaliated against us and punished us for our support of the women. Runnels and Fleming wrote scathing letters to the Management Review accusing me, Benningfield, and Frankhouser of having our own agendas, being troublemakers, and habitually bypassing the chain of command. In addition, they put a negative mark on my job performance review (JPR), after I confronted them about their treatment of Frankhouser and Benningfield.

6. "When I was harassed and retaliated against for speaking up, I reported the hostile working conditions to Chief of Police Sam Nuchia. Nuchia had known me for approximately twenty-five (25) years and had stated that he believed both Peggy Frankhouser and I were competent, dependable, and outstanding officers. In response to my complaint, Nuchia accosted Runnels and Fleming and told them that my JPR for the previous period needed fixing. He called me to his office, and handed me a JPR that he had filled out personally, which had a score of thirty (30), the highest possible rating. Nuchia was not even with the Department during the period for which the modified rating stood. Nuchia assured me that my JPR would remain at that level as long as he was Chief. Despite Nuchias orders, Fleming refused to sign the JPR, and took a sick day to avoid Nuchia.

7. "Chief Nuchia has been and continues to be a close friend.

"Further, affiant sayeth not."

/s/_____
NORBERT LeBLANC

SUBSCRIBED AND SWORN TO before me by Norbert LeBlanc the 26 day of March, 1996.

/s/_____
SUSAN KAY ANDERSON
Notary Public in and for the State of TEXAS
My Commission Expires: 8/31/97

APPENDIX P

Exhibit 1

CITY OF HOUSTON
INTER OFFICE CORRESPONDENCE

To: Sam Nuchia
Chief of Police

From: Peggy A. Frankhouser, #31322
Latent Print Examiner
Debbie Benningfield, #53865
Fingerprint Classifier II

Date: March 2. 1992

Subject: Health and Welfare Issues Of
The identification Division, And
Its Employees

Dear Chief Nuchia:

Congratulations on your appointment as Chief of Police. We know that you will be overwhelmed at the issues that must be addressed during the first few months of your job. However, we feel that these issues that we bring to you require immediate, attention as the health and welfare of the Identification Division and its employees are at risk.

We recently met with Chief Watson on February 7, 1992 and

presented her with a copy of the attached letter. We only had a ten minute meeting, therefore, none of these issues were discussed at length. As of this date, we have received no communication from Chief Watson.

During this brief meeting, Assistant Chief Bradford was in attendance along with Jan Rich, Attorney for HPOA members. While we have tried to resolve these issues through the chain of command, that attempt has failed. We wish to work with you and your staff on these issues so that it will not be necessary to pursue them outside this department.

You should know that you have our total support and highest respect and that we are available to assist you in the goals of this department. However, these issues and our division have been pushed aside for so long, by so many, that it is now in a most critical state. Employees are seeing the staff psychologist in record numbers, one employee has taken a medical retirement, and we have one employee off on injured on duty, directly related to stress in the workplace. Others have spent thousands of dollars attending to stress related sickness, while others have just given up.

We know that this department can be a showplace. However. it takes the discipline and hard work of each member and the support of management. We are here to support you and respectfully request that you review this document and meet with us as soon as possible.

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

CITY OF HOUSTON
INTER OFFICE CORRESPONDENCE

To: Elizabeth M. Watson
Chief of Police

From: Peggy A. Frankhouser, #31322
Chief of Police
Latent Print Examiner

Debbie Benningfield, #53865
Fingerprint Classifier II

Date: February 7, 1992

Subject: Health and Welfare Issues of The Identification Division, And Its Employees

We have felt compelled to meet face to face with you because attempts to rectify problems in our division have failed thru use of the Chain of Command. We earnestly feel that the facts presented to each of the below named individuals have not found their way to your attention. Without the facts and the documentation to prove the facts, it is in our opinion impossible to solve the problems. The following people and their titles or name of their organizations are listed for your information:

Chief Lee P. Brown
Chief of Police
Houston, Texas

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

Asst. Chief T. D. Mitchell
Technical Services Command
Houston Police Department

Asst. Chief J. L. Kendrick
Support Services Command

Asst. Chief F. E. Yorek
Support Services Command

Asst. Chief K. L. McBurnett
Support Services Command

Donald Hollingsworth, Director
Management Information Services
Houston Police Department

Zanna Stepanek, Director
Management Information Services
Houston Police Department

Bobby Camp, Director
Management Information Services
Houston Police Department

Sgt. William Harness
Support Services Command

Sgt. Bill Weaver
Support Services Command

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

A. Wade Runnels, Administrator
Identification Division
Houston Police Department

R. T. Fleming. Asst. Administrator
Identification Division
Houston Police Department

Asst. Chief C. O. Bradford
Technical Service Command

Dr. Gregg Reide
Psychological Services
Houston Police Department

Johnny Holmes, District Attorney
Harris County

David Bell, Attorney
Workmen's Compensation Investigator

Diana Ball, Attorney
Workmen's Compensation Investigator

Legal Staff
Houston Police Officer's Association

The last person we met with on this topic was Asst. Chief C. O. Bradford on Friday afternoon January 25, 1992 in the Latent Lab. Chief Bradford has failed to deal with the issues brought to him and the "management review team" on

numerous occasions. His statement has been repeatedly "I don't want to hear the problems, I want to solve the problems." However, before a problem can be resolved, one must understand the issues involved. One must listen and attempt, to understand the problems before a real solution can be found. His failure to review the documentation we have in our possession gives us no other alternative but to bring these issues to your attention.

Our first request is the removal of A. Wade Runnels, Administrator, Identification Division and R, T. Fleming, Asst. Administrator, Identification Division from their positions until these issues and problems can be resolved. We feel this extreme measure is necessary in order to stabilize the health and welfare of the division employees and specifically for myself and Debbie Benningfield. So that we no longer have to suffer from retaliation and discrimination by these two individuals as we try and bring the problems and issues to you.

To quote from the General Orders #220-38 "Departmental Values and Guiding Principals" the policy of this department is "TO IMPROVE THE QUALITY OF WORK, LIFE". . . . We shall strive to improve the working environment for the department's employees by engaging in open and honest communication and demonstrating a genuine concern for one another." "DEMONSTRATE PROFESSIONALISM". . . "We shall always engage in behavior that is beyond ethical approach and reflects the integrity of police professionalism."

Throughout the past 15 years members of our division have not been offered this simple courtesy. Specifically, this past

year these issues and problems within the Identification Division have created situations resulting in one employee taking an early medical retirement, one employee currently on a workmen compensation "injury on duty" and numerous other employees suffering mental and physical anguish. Many of our employees have been to the department's own psychological services division. These individuals include both sworn and civilian members. Dr. Reide has stated that our division uses his professional services more than any other division in the department.

This document will identify some problems and issues as well as possible resolutions, This information provided to you today, can not fully explain the multi-faceted problems that exist within the Identification Division. We know that there was a "management review" conducted in our division in April 1991. Since that time, problems and issues have not been dealt with and thru this document, we hope to provide you with enough information for you to act on.

CREDIBILITY AND LEADERSHIP

> "The two major components of credibility are trustworthiness and expertise".

Direct issues dealing with lack of credibility are as follows:

ID Tech Supervisor Promotion Plan ....

A rumor surfaced within the division relative to the promotional criteria for ID Tech. Supervisors. It was learned that Job Performance Review (JPR), Seniority, and

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

Attendance would be the criteria for promotion. Many sworn members of the division opposed this criteria only. We approached Mr. Runnels, to get permission to attend the supervisors meeting to discuss this topic. In the supervisors meeting we requested that technical testing relative to the Fingerprint Discipline be part of the criteria. This request was made because many, if not all, of the candidates for promotion never were tested at entry level. We pointed out that if JPR, seniority, and attendance were the only criteria for promotion then three (3) white males would be promoted. Two of the three white males were documented to have great difficulty in the use of the Automated Fingerprint System. This fact only reinforced our position that technical ability be mandatory. In this meeting an agreement was reached to have the only female sworn supervisor, Marilyn Mokwa approach civil service to have technical ability included in the criteria. Later in a meeting which excluded Mokwa, the male supervisors agreed to use their original criteria. When Mokwa approached them on the matter, they responded by saying they did not include her because they knew her position. This issue was brought before Bobby Camp, Director MIS by Mokwa and myself. He turned it over to Civil Service. During the course of this issue Mr. Runnels changed his position numerous times. He proved himself non-credible and he showed absolutely no leadership on this matter.

This issue lasted for several months and caused undue stress, anxiety, and frustration for employees of the division. Employees were outright misled and lied to on numerous occasions by Mr. Runnels. This is an example of sex and racial harassment. DOCUMENTATION CAN BE PROVIDED.

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

AFIS ISSUES (Automated Fingerprint Identification System)...
AFIS Manager, Debbie Benningfield and the ID Officer Supervisor's are pitted against each other on issues relative to AFIS by Mr. Runnels, and Mr. Fleming.

Mr. Fleming stated to a Printrak representative, that his future plans for AFIS did not include AFIS Manager Officer Debbie Benningfield.

AFIS Manager Benningfield has attempted to find out what her future is in AFIS thru Mr. Runnels, and he has never provided her an answer. An attempt to resolve this issue thru Asst. Chief Bradford failed as well. AFIS Manager Benningfield indicated to Asst. Chief Bradford that the continuous stress from not knowing her role, was aggravating her health.

We can not understand why her position is in jeopardy since she is the foremost leader in the field in the United States. She has received an overall outstanding rating by Mr. Runnels, and he has never discussed any area in which she does not perform excellent work.

The AFIS Manager's position became an issue during the "management review" and after she gave an ordered statement to workmen compensation on the Pamela Grant Wood incident. This leads us to believe that retaliation is the motive.

Although the Chief of Police Plan of Action denoted the Identification Division's responsibility was to create a "KEY AFIS PROGRAM", Mr. Runnels has failed to comply. The

department is scheduled to receive the AFIS Upgrade early next month, at a cost of $1.2 million dollars. The maintenance fee will be $156,000 a year and still there is no program in place to use the technology effectively with properly skilled operators.

A recommendation to resolve this issue has been made but never implemented. The recommendation is to develop a "KEY AFIS PROGRAM" and staff it with skilled operators with a minimum two years experience in the fingerprint discipline. These fingerprint operators muse have demonstrated skills in the fingerprint science prior to being introduced to the AFIS system. We feel the two years experience prior to becoming an AFIS fingerprint operator will allow them to develop the skills necessary to combine the fingerprint discipline with computer technology, as well as give them time to develop an "eye" for performing comparisons.

This "KEY AFIS PROGRAM" will become even more mandatory, as the State DPS interface becomes a reality. The State has established criteria for remote users that require certain skills in order to interface with the State program. Certainly, our department would want the same type of skilled operator to utilize our own system.

Quality of fingerprints taken in the prisoner processing area by jail attendants must be addressed. Our fingerprint system will only be as good as the rolled fingerprint impressions that are taken by these individuals.

The fingerprint system has been a valuable tool to the

Houston Police Department and promises to become a more valuable tool as the department adds skilled operators and interfaces with the State. When we can solve a robbery case in 31 seconds, it doesn't take long to understand the potential. Many of the department's programs intertwine thru the fingerprint system, such as crime analysis, the investigative command, the fugitive detail and any warrants or wanted information. As the AFIS becomes networked the potential is unlimited.

Printrak Correspondence .....
On January 11, 1991, we received a letter delivered to our desk from Mr. Runnels relative to our communication with Printrak. Since both of us have been involved with the technology, contract, and operations of the Automated Fingerprint System, we asked for a verbal explanation of his request. Mr. Runnels stated that Bobby Camp requested that he put this in writing to us. Later in a meeting with Mr. Camp, with Mr. Runnels in attendance, Mr. Camp adamantly denied having asked Mr. Runnels to put anything of this nature in writing to us. This issue resulted in a further discussion in the lack, of credibility of Mr. Runnels, wherein I cited other examples where Mr. Runnels had lied.

Westside Command Station .....
This full staffing of Westside command Station has been an issue that has been discussed on numerous occasions with Mr. Runnels and Mr. Camp. The staffing techniques used at Westside caused the disbandment of the "KEY AFIS PROGRAM". Early on Mr. Runnels sent (9) of the most experienced fingerprint employees to Westside. Currently, (6) fingerprint employees staff Westside. The staffing numbers

and work demands by fingerprint personnel at Westside is completely out of line compared to the staffing shortages and work demands at Central. While we do not advocate removing all fingerprint personnel we do suggest that one fingerprint employee per shift can handle the work demands. When the need arises additional fingerprint personnel can be assigned to Westside from the Central Identification Division. This would beef up the Identification Division Central staffing needs and help create a "KEY AFIS PROGRAM".

Most fingerprint personnel at Central feel that there has been a lack of leadership by Mr. Runnels on this issue because he is allowing these non-credible staffing techniques based on personal relationships. DOCUMENTATION CAN BE PROVIDED TO SHOW THE WORK DEMANDS AND PERSONNEL ALLOCATED AT WESTSIDE VS. THE WORK DEMANDS AND PERSONNEL ALLOCATED AT CENTRAL.

PERSONNEL ALLOCATION:
(Supervisors)

Central Fingerprint Personnel

	Supervisors	Employees
7-3 Shift	3	4

Two supervisors are classified and one is civilian. The civilian supervisor's assignment is the same as that of a FP Tech II, Monday-Friday. On the weekend this civilian supervisor, supervises one civilian FP Teh. There is one sworn fingerprint employee that works Saturday, and one that works on Sunday, however, they get their assignments given to them

on Friday by the sworn ID Officer Supervisor, as the civilian supervisor can not supervise a sworn member.

	Supervisors	Employees
3-1 1 Shift	3	3

There are three supervisors for three civilian fingerprint employees on this shift. Two of the supervisors are civilian and perform Tech II duties Monday-Friday.

	Supervisors	Employees
1 1-7 Shift	3	2

There are 3 supervisors for two civilian fingerprint employees on this shift. Two of the supervisor are civilian and perform Tech II duties Monday-Friday.

Westside Fingerprint Personnel

Supervisors	Employees
3	3

These numbers represent two sworn supervisors and one civilian supervisor to supervise three fingerprint employees.

In summary we have twelve supervisors, six sworn supervisors and six non-sworn supervisors to supervise twelve front line employees three sworn and nine non-sworn employees. This points out that management within our division has failed to provide leadership within the civilian process. Management's intention was to create a Tech III position in the career ladder of the civilian employees. Sworn

members within the division were assured by Mr. Runnels that the Tech III position would not be a supervisory position. However, Mr. Runnels presented the Tech III position as supervisory to the Personnel Division. Again, this points out Mr. Runnels lack of credibility to employees. We propose that the current sworn supervisors at central be replaced with civilian tech supervisors. This would allow the more experienced supervisor to perform duties that will prevent major liabilities to the department and the City. We further propose that the two sworn supervisors at Westside be replaced with two Tech Supv. , and the non-sworn fingerprint personnel be re-assigned to Central. If these proposals were put in place we then would have additional personnel to assign to a "KEY AFIS PROGRAM" and assign quality control programs to the ID Officer Supervisors.

Erroneous Identifications .....
An erroneous identification is an identification that is made in error. This type of error is an error that is not tolerated in any credible identification division world wide. In the Houston Police Department's Identification Division prior to the civilianization process, this type of error was not tolerated at all. In my twenty-five years in the Houston Police Department's Identification Division there have been sworn members fired for making multiple erroneous identifications.

There are two types of erroneous identifications that can be made. This first one that we would like to bring to your attention would be one made by a fingerprint employee who works on what we call the front line. These employees classify fingerprints, enters them into the fingerprint system, checks the respondents to determine if the arrested suspect has

a prior record and signs the fingerprint card if no prior record is found, to certify there is no prior criminal history record within the files of the Houston Police Department Identification Division. The other responsibility the front line fingerprint employee has is to verify repeater prisoners fingerprint's match to the known fingerprint's on file within the Identification Division. An erroneous identification is made if a fingerprint employee determines that the arrested suspect's fingerprints match a criminal record in the files of the Identification Division, when in fact the fingerprints do no match.

There is no excuse for this erroneous identification. Any credible Identification Division in the world has two fingerprint examiners look at the identification to determine if the identification is correct. In fact, our division does have a rule that two examiners will look at the identification independently. The only trouble with the written policy that Mr. Runnels has established is that he only has, in most instances, two examiners who have little experience examining the prints. We have found numerous erroneous identifications because of lack of qualifications, and/or experience of these civilian personnel. This policy was just implemented in 1989 after this issue was brought out in a grievance. All credible departments have supervisor's only check the examiners work. We have begged Mr. Runnels to use the experienced ID Officer Supervisor to do this job function, so as to protect the integrity and liability of the Identification Division, the Houston Police Department, and the City of Houston. Robert J. Hazen, Supervisor Latent Print Section of the Federal Bureau of Investigation, retired, related the facts of a case in Arizona where an erroneous

identification was effected, and the suspect filed a law suit. The city whose responsibility it was to hire, train and monitor the fingerprint examiners was ordered to pay 17 Million dollars for the erroneous identification.

Factors to be examined:

ID Officer Supervisors are Lt. pay grade, $46,295.00 per year.

Mr. Runnels has two ID Officer Supervisors at Westside, one on the day shift and one on the evening shift who supervise only one fingerprint examiner each. These supervisors could be better utilized at Central responsible for our fingerprint files and criminal history files. These two sections reflect the areas of highest liability for the department and the City of Houston. These files are being accessed not only by HPD personnel, but by Harris County District Attorney's Office and any other law enforcement agency in the United States. Incorrect information passed along to any of these agencies could result in lawsuits like the one previously mentioned in this correspondence. The information released by our department is used to set higher bonds or no bonds for prisoners who are arrested and charged. Incorrect criminal history information could also cause addition felony or habitual charges to be filed on a prisoner based on erroneous identifications. The intended purpose for ID Officer Supervisors and their civilian counterparts, ID Tech Supervisors was to double check work being done by line personnel.

Civilian technicians who check other civilian technician's

work is bad policy and has led to many erroneous identifications. There is no way to know how many erroneous identifications have been made and not caught yet. This practice must stop to protect the liability of the division, department, and the City.

Arrests have been removed from criminal history records here in this department, after challenges by citizens. Threats by citizens to sue the City over such erroneous identifications have been made.

To further show the lack of credibility and leadership Of Mr. Runnels, there is a civilian fingerprint technician who made two erroneous identifications that were checked by another civilian fingerprint technician who after examination agreed with the first employee. One of the two was fired and the other employee later resigned for personal reasons but later sought reinstatement to our department. Mr. Runnels hired her and has recently promoted her. OTHER DOCUMENTED EXAMPLES OF THIS SERIOUS NATURE CAN BE PROVIDED.

INCONSISTENT DISCIPLINARY ACTIONS

There are numerous examples of this type of action, however, the following is given to merely touch on the issue.

A sworn member was given a one day suspension for an erroneous identification while another civilian employee had two documented erroneous identification but did not receive a suspension.

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

A sworn member was given a written reprimand for making two AFIS classification errors and not checking respondents. Another civilian employee had numerous AFIS classification and other errors that had consistently been brought to Mr. Runnels attention. In the case of the civilian employee, Mr. Runnels ordered the civilian's supervisor to give him an unscheduled JPR. The supervisor wrote correspondence asking that this not be done because the employee felt that his mistakes were due to him needing glasses, and because he was in a hurry to get all the work done. Mr. Runnels never followed through and this employee continued to make mistakes with no action taken.

In another incident, a different civilian technician continued to make mistakes in AFIS. These errors each time were brought to the attention of her supervisor. I had also discussed this with the employee to make sure she understood the AFIS classification rules she was taught during her AFIS training. After her supervisor failed to take any action, I put together a letter outlining the problems and met with Mr. Runnels. I explained the problems and went through the documentation. I further suggested to Mr. Runnels that her supervisor and he and I meet together and discuss the problems. Mr. Runnels agreed with this approach. However, Mr. Runnels held a meeting with her supervisor and excluded me. They decided that instead of my recommendations, her supervisor would review all her work. It should be noted that her supervisor has never wanted anything to do with AFIS, and in the past has asked that I review all work entered by his shift. Furthermore, it should be noted that this is the same supervisor that would not give the unscheduled performance review. Not only is this an example of inconsistency in his disciplinary actions, but is

a perfect example of his lack of credibility.

Another example is a female civilian technician terminated from her assignments in AFIS due to her inability to perform her duties. This was a recommendation by her supervisor and myself. This recommendation was only after re-training did not help. At the time she was terminated from her assignment in AFIS she was a Fingerprint Technician I. This employee was promoted to a fingerprint technician II even though one of the requirements was to be able to perform AFIS duties. This action caused other employees to say "they better not hold me back from a promotion if I am not able to perform duties in AFIS. Another employee said, "if you don't want to work in AFIS, all you have to do is "screw-up", because now they can't do anything to you". Employees have been disciplined for making erroneous identifications, but nothing was done to an employee for missing (6) #1 respondents. This error is one in which the AFIS system generates a list of potential candidates for the classifier/technician to compare fingerprints with. A civilian fingerprint technician missed making (6) #1 respondent even though the identification number was the #1 subject printed out on the responder list. Certainly, an erroneous identification is more serious, but in the *case* where identification is missed, the suspect is released without being properly identified. The results in performing a consolidation of the two records after DPS notifies us that a mis was made. It takes approximately (2) hours to clean up these misses. This employee was never reprimanded by his supervisor. He was recently promoted to a Technician Supervisor.

In another incident a different civilian employee was

complained on because of a altercation with an officer. Some of our clerks have had numerous complaints regarding their demeanor by fellow employees of the division and officers within the department. On one occasion Officer H. Hope and D. Benningfield complained to Mr. Runnels about their lack of respect when speaking to citizens. Directly after we left his office he page their supervisor to report to his office. When these supervisors came out the approached us and began calling us "snitches". The clerks continued to call us "snitches and bitches" for months afterwards, and to this date they still show lack of respect to citizens and other employees. Officer Hope now refuses to go to management about an complaint. This is a perfect example of how Mr. Runnels pits employees against each other instead of handling a complaint in a professional manner.

SMOKING ISSUE

This incident began in November 1988 when I wrote a letter requesting that serious consideration be given to the current policy of smoking in the fingerprint file and clerical file area of the Identification Division. In that letter I asked that smoking be eliminated in , common work areas. I stated that smoking irritated lungs, and eyes of employees who do not smoke and have to work in the common area.

Last year, I wrote another letter in which I noted that the current smoking policy was not being enforced, and in fact Mr. Runnels, and Mr. Fleming were prime examples of the violation. In that letter I requested that smoking cease in the Identification Division. never received a reply from Mr. Runnels. However, while in Bobby Camp's office in January

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

1991, while we were discussing Mr. Runnels and Mr. Fleming's lack of credibility, I brought this information forward to Mr. Camp. Mr. Camp directed Mr Runnels to take care of the problem in that City policy reflects that the non-smoking employee had the right to a smoke free workplace. About four to six weeks later, during a supervisor's meeting, Mr. Runnels stated that there was a complaint about smoking within the division. He directed Barry McDermott, ID Officer Supervisor to conduct a survey of the employees. This survey was provided to the management review team. The survey included the following questions:

> What is your sex?
> Do you smoke?
> Are you a sworn member?
> Are to a civilian member?
>
> Do you work on the print side?
> Do you work on the clerk side?

Then the survey gave the employee several options to choose from which did not include a completely smoke free Identification Division. I submit to you that this was a sexual harassment tactic and insult to the employees who are guaranteed, a smoke free environment. To this day violations still occur. Most all of the smokers within our division have offices with doors which open to a common hallway. The return air filters the smoke right thru this hallway where there are fingerprint files. This harassment is led by Mr. Fleming and Mr. Runnels. I might add that Mr. Runnels, and Mr. Fleming have never given me an answer to my request for a smoke free environment.

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

INVESTIGATIONS BY OUTSIDE ENTITY

On two separate occasions in 1991, two separate workmen compensation attorneys came to the Identification Division to investigate allegations by two separate employees, both white females. Their inquiry surrounded allegations made by Pamela Grant Wood and Marilyn Mokwa, both sworn members, who were both claiming stress related injuries inflicted on the job by management.

Officer Benningfield, myself, and civilian fingerprint tech. Cheryl Hurts witnessed the mental breakdown of Officer Grant, which later led to a sustained Injury on Duty decision by the Workmen's Compensation attorney. Mr. Runnels never notified his supervisor, Mr.Camp of Officer Wood's breakdown. Five-days after the incident, Officer Benningfield met with Bobby Camp, wherein she learned that Mr. Runnels never informed Mr. Camp of the incident. GENERAL ORDER 300-5 states SUPERVISOR'S INJURY - INVESTIGATION REPORTS "All supervisor's injury investigation reports shall be submitted to the personnel division no later than loam the day after the injury except Saturday, Sunday, and City holidays. In the event of death or life threatening injury, notification must be immediately made to the City of Houston safety office."

During this incident Officer Grant was threatening to commit suicide. Mr. Runnels immediate solution was for us to take her out for a "drink". This is another example of poor leadership and professionalism.

The witnesses, all female were never interviewed by any

department employee, which leads us to believe that there was no department investigation on this incident.

GOALS OF THE DIVISION

Each quarter a command executive summary report for the previous quarter is submitted up the chain. Each quarter our AFIS Manager submits information relative to AFIS concerns. On one occasion, Mr. Fleming interpreted her report, however he left out most of the critical issues she addressed. When it was discovered the report did not reflect her concerns she met with Mr. Runnels who then retrieved the report that had already been forwarded up the chain and revised it. On another occasion Mr. Fleming blamed Latent Examiners taking vacation, time due, and sick time for the decline in work performance by the section. In fact, this period of time was when the latent lab had only one clerk and the work demands for clerical help increased dramatically. Latent examiners who are Lt. pay grade, spent more time answering telephones, helping walk-ins, typing reports, filing, and department required in-service training, than making Technical examinations of evidence. In contrast, Mr. Fleming's own study revealed 16, 000 man hours available with 80,000 man hours required to do the work. These mixed messages sent up the chain show a lack of credibility on the part of management in the division and further causes additional problems with morale.

GENERAL ORDER #100-6 STATES" The department's goals form the basis for the goals and objectives of the various Commands, Bureaus, and Divisions within the Department. These goals and objectives are intended to be reviewed and

refined on an annual basis, and to be subject to ongoing development using input from persons at all levels of the department."

With this goal in mind, we have attempted to bring about improved changes within our division and have been ignored at every level. This same general order says "these goals and objectives shall be distributed to all personnel within the respective command, bureau, division, or detail". Mr. Runnels has failed to abide by this general order by not providing us with the goals and objectives of our division.

LACK OF LEADERSHIP ISSUES

Below are some examples that outline Mr. Runnel's and Mr. Fleming's lack of leadership ability. These issues were discussed in detail with the management review team by the employees of our division.

Pitting employees against each other.

Inconsistency in disciplinary actions.

Inability to win support of divisional employees due to lack of credibility.

Working to take over additional responsibilities from other divisions when our own divisional needs have not been met.

Inability to convince the jail attendants and their supervisors the importance of taking good rolled

fingerprint and palm print impressions.

Does not allow women other minorities in the decision making process.

Constantly changes work hours and work shifts of personnel causing deep morale problems.

Failure to relate critical needs of our division to The command staff. The issues involved in his failure are overtime monies, adequate staffing, qualified personnel, adequate training.

Failure to communicate openly and honestly with all employees.

Failure to comply with the "CHIEF'S PLAN OF ACTION" wherein it states that the Identification will implement a "KEY AFIS PROGRAM".

Failure to set an example for supervisors in leadership values.

DOCUMENTATION CAN BE PROVIDED.

LIABILITY ISSUES

Training...
When the department began its civilianization in our division there was no program put in place. To this date there is still no program recognized by the HPD Academy. There is a

divisional training program that has been developed to train newly hired fingerprint personnel in the basic science of fingerprints. However, Mr. Runnels has allowed our training supervisor to retest personnel who failed the final test for the course. To our knowledge there are no training standards set for fingerprint trainees.

Throughout the past several years Debbie Benningfield has worked with the FBI to organize school relative to the fingerprint discipline. These Schools were made available to surrounding law enforcement agencies end were well attended by those agencies. Recognizing the need for a well structured class, Debbie met with Lt. Oettmeier, and Earl Campa to discuss the possibility of working with the FBI to develop a Forensic Science regional training concept. A subsequent meeting between, local FBI representatives and our department, which Mr. Runnels attended, produced the framework, in which to begin a formal program. This meeting was followed up with a needs assessment survey to surrounding agencies and the results concluded that such a program was needed and desired. Mr. Campa followed up with a letter to Bobby Camp requesting the assistance of Barry McDermott, ID Officer Supervisor in charge of training, to develop the basic fingerprinting program. Mr. Runnels claims to have supported this program but has never followed up on Mr. Campa's request.

It should be noted that the FBI conducts 29 weeks of classroom study in the science of fingerprints prior to putting trainees on the front line. Each trainee's work, is checked several times by different levels of supervisor's and fifteen

months later the trainee returns to class for the second half of their training, (advanced) which includes searching procedures.

Lt. Oettmeier has included a forensic science training program in. his proposed master training program for the department. We believe that the department should support this concept and that our division supply the necessary personnel to implement such a vital program. We further believe that the department should develop a strict set of entry level standards for fingerprint personnel. This should be followed by an earnest recruitment program to recruit qualified personnel.

Mr. Runnels failure to address, implement, and support strict entry level standards has forced us to employ personnel who are not qualified to meet the demands of the fingerprint discipline. This has created animosity and resentment within the division because these employees are being paid to do a job that they can not perform. Though morale is an issue within the 'division, these people are creating a liability for the department and the City. DOCUMENTATION CAN BE PROVIDED.

Pam Grant Wood Issue...
The harassment, retaliation, and discrimination has all been documented by Workmen Compensation. These issues continue and has been the cause of numerous health and welfare problems within the division.

It is only a matter of time, before another employee has a complete mental breakdown or serious injury is inflected.

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

Erroneous Identifications...
It is impossible to determine how many erroneous identifications exist within our files. Previously, citizens have threatened to file law suites after determine erroneous information was added to their criminal history. Surely, if the public knew of this problem, our city could not financially afford the law suits that would result.

Quality Control...
Not only are erroneous identifications a potential problem in our division, the lack of quality control within our fingerprint files and criminal history files are a serious problem. Misclassed fingerprint cards is a problem very well documented. If a supervisor was reviewing work, these mistakes could be caught. A misclassed fingerprint card will be filed incorrectly in our manual files. These files are used daily for searching and retrieving fingerprint cards. A manual fingerprint search will be missed if the card is classed and filed incorrectly. Our recommendation in the past is within the reorganization plan, to place two ID Officer Supervisor's over these files with the responsibility of reviewing the fingerprint cards prior to being filed. If an employee is found to have problems classifying, they would be scheduled, for additional training. This would document and eliminate any possible law suits due to lack of training.

Another issue are the Criminal History files. In many cases these files do not contain enough information needed to conduct an investigation on a suspect. We have suggested that a ID Officer Supervisor take on the responsibility of revising the "criminal history screen" to include more information. This supervisor could also be responsible for maintaining the

integrity by reviewing all records as they are edited for new criminal information. There are many areas that could create a liability for our department. For instance a CID Officer almost arrested someone due to an erroneous FBI number that was typed on a criminal history record. This officer realized something was wrong when he ran the FBI number and it came back to a different person. He based this on the descriptive information. He ordered a set of fingerprints on the FBI number and brought them to Dabble Benningfield for a comparison. This comparison revealed that an incorrect FBI number had been added to our record. In another incident a citizen requested an immigration letter. The citizen was found to have a record by name. A fingerprint classifier compared the prints of the citizen with the criminal record and found them to be the same. A clerk in our division typed the requested immigration letter, listing all the alias names (which included a man's name) in the letter. The citizen was furious when they read the letter and saw a mans name. This citizen immediately asked for an explanation then demanded that our division remove this erroneous name. Mr. Runnels had the name removed by deleting the complete record then re-entering it. To insure that our records maintain the highest integrity, we recommend that the ID Officer Supervisors be responsible for quality control for both our fingerprint files and our criminal history files. This task should not be delegated but be the sole responsibility of. a tenured ID Officer Supervisor. Prior to Mr. Runnels, all previous Administrators mandated that ID Officer Supervisors perform these functions. Any deviation from a policy such as this will place our department and the city of Houston in great jeopardy.

3/2/92 letter to Respondent Nuchia from Petitioners Benningfield & Frankhouser

Quality Control within AFIS has been an issue addressed repeatedly with Mr. Runnels. Currently, due to lack of personnel, only work of recently trained employees are being reviewed. Our AFIS database is the most critical of all databases. It is only through good quality fingerprints that are entered correctly can we identify prints developed from scenes of crimes. The AFIS technology .was developed for the purpose of identifying unknown prints. Our Latent Examiners have done an excellent job in training Crime Scene Unit Officers techniques in developing prints. However, without a good set of rolled fingerprints taken from prisoners, these latent prints developed will be of no use. Though it has been discussed with Mr. Runnels, he has never resolved the problem of poor prints taken by jail attendants. On numerous occasions we have brought to his attention that 60-70 percent of all palm prints taken are unacceptable. Training programs have been developed and taught to all jail attendants that work the prisoner processing room. Mr. Runnels and Mr. Fleming have not demonstrated any leadership to resolve this issue. We have made recommendations that within the KEY AFIS PROGRAM that a position of quality control manager be designated. This position would take on the responsibility of performing quality control of all records entered in the AFIS computer as well as oversee the training of new personnel.

At issue is how the department addresses Class B & C members. Almost everyone of us hold Advance Certifications as peace officers from TCLOSE. An example of this iniquity would be letters that come down the Chain of Command addressing our sworn members as Mr., Mrs. ,or Ms. instead of Officer or their title, such as Latent Print Examiner, or ID

Officer Supervisor. This may seem to be a trivial issue, however, it is one that can improve the morale and will reinforce to the B or C member that they are accepted.

Although there has been a career ladder established for sworn members of Class B, there remains a question as to whether the department will afford us the opportunities to promote. We were assured by Chief Brown that, "Over a period of years, civilians will gradually replace (not displace) the classified officers presently assigned. The incumbents, however, will continue to enjoy a career path of their own which I plan soon to make more meaningful." Questions still remain relative to promotions and we ask that this topic be addressed.

CIVILIANS...

When the civilianization process began, Chief Brown met with us to discuss job duty descriptions and qualifications. In 1984 he assured us in writing that "applicants for these jobs will be carefully screened, but naturally will not be required to meet the standards of those applying for entry into the classified police services. But I will still expect them to possess the skill levels presently required". As of January 3, 1992 the Fingerprint Technician Position required no experience. When our division pointed out to civil service that qualified applicants could not be recruited based on the low pay scale, civil service lowered the skill requirements; civil service took this option rather than to raise the salary to hire qualified applicants. Mr. Runnels has promoted civilians who did not meet the requirements of the civil service position. This has created a situation wherein civilians of the same job description are not required to perform the same job

functions. This in turn causes animosity and morale problems with all members of the division. These measures have resulted in a greater turnover of personnel which has decreased the productivity of the Identification Division and increased the liability of the Department and the City of Houston.

MANAGEMENT REVIEW

Next we want to address the "management review" of our division and the subsequent handling of that process by Asst. Chief C. O. Bradford. Although the members of our division participated in the management review process in good faith, we now. believe that the entire process was a 'witch hunt' by the Support Services Command to determine their liability in the matter. It should be noted, however, that members of this investigating team, repeatedly told Identification Division employees that they had enough information on Mr. Runnels and Mr. Fleming to remove them from the division. They even went so far as to tell us that we, the members of the division, had suffered enough over the years, and they intended to give us some relief.

Weeks passed, with no news on the management review, then once again our division received a new Asst. Chief. I visited Chief Bradford to find out what was the status of the management review, and he told me that there wasn't a management review. By this statement, I later learned that he didn't want the process we went thru labeled. He further stated that he had not had time to look over the problem. I was shocked. We had one employee off on Injured on Duty and several others going to Dr. Reide to get relief, and

another employee on a Leave of Absence without pay. He further stated that he found it hard to believe that two Sgts. could possibly gather information accurately to know the problems that existed. I offered him instances of problems and he told me that he didn't want to hear the problems, he wanted solutions.

Subsequent meetings with Chief Bradford ended in the same manner, He did not want the documentation and didn't want to hear the problems.

In October of 1991 Chief Bradford put (20) twenty Identification Division employees thru the most demoralizing exercise they have ever been through. In this meeting, Chief Bradford admitted that our division was in terrible shape. He also stated that the command staff prior to him was at fault for not handling the problem. He stated that the problems should have been corrected a year and a half ago. He further stated that the Department's management failed in planning short or long term for civilianization. Chief Bradford continued by stating that Mr. Runnels and Mr. Fleming's hands "were tied' and it was the Department's fault the Identification Division was in the shape it was in. This was witnessed by two different groups of ten people from the Identification Division.

Again, we both approached Asst. Chief Bradford in an attempt to give him documentation showing him problems we currently were faced with in the division. He again refused to deal with the problems, by stating that Mr. Runnels and Mr. Fleming were running that division. Chief Bradford tells us that he has read all of the documentation, but the management

review team never asked for our documentation. His failure to review our documentation, leads us to believe our issues will not be addressed. We feel that the problem can not be solved until you know what the problems are. Chief Bradford's demeanor in dealing with us has added stress, not relieved it.

CLOSING STATEMENT

In closing, we have always tried to resolve the problems, rather than create problems. These issues are just a few of problems that have occurred within our division. The dedication to the fingerprint discipline, the Houston Police Department, and the City of Houston is the driving factor behind our determination to resolve these issues. As you have stated, "You would like all members of the department to be geared toward a problem solving initiative." We earnestly hope that you take this documentation as our initiative to solve the problems we have identified.

/s/_____
Peggy Frankhouser
Latent Print Examiner

/s/_____
Debbie Benningfield
Fingerprint Classifier II

APPENDIX Q

F.E. Yorek, Assistant Chief
Information and Support Services

W.J. Harness, Sergeant
W.C. Weaver, Sergeant

June 18, 1991

ASSIGNMENT:
Results of Identification Division Review

As you recall, you commissioned an inquiry into the operation and administration of the Identification Division. This correspondence has a two-fold purpose:

> Delineate findings discovered pursuant to our inquiry, during which past and present employees of the Identification Division were interviewed, and
>
> Recommend, for your consideration, actions which addresses currently dysfunctional organization and administrative concerns.

Assignment Overview

Sergeant W.J. Harness, Information and Support Services, and Sergeant W.C. Weaver, Management Information Services, were directed to conduct an internal investigation/inquiry into the operation and administration of the Identification Division. Our inquiry would eventually address four key areas of operation of the Identification Division.

Excerpt from 1991 Management Review Document

> *General Administration, Automated Fingerprint Identification System (AFIS) operations and management, Supervisor/Subordinate Relationship,* and an assessment of the *Overall Morale and Health of the Organization.*

On April 10, 1991, B.E. Camp, Director, Management Information Services, and Sergeants Weaver and Harness were in a staff meeting in Assistant Chief Yorek's office. The meeting was called to address ISS and MIS concerns raised by several employees into the operation and management of the Identification Division.

During this meeting, Assistant Chief Yorek advised Sergeants Weaver and Harness of his decision to conduct an internal ISS investigation of the Identification Division. Sergeants Weaver and Harness, having received their charge, obtained several internal Houston Police Department documents (see Attachment A).

3 relates and controls exposure to the system in segments most suited to the employee's individual needs (with appropriate testing instruments), and

4 prevents the employees from applying for the "mastery" examination until he/she has successfully completed all positions and associated tasks and test listed in the work book.

Excerpt from 1991 Management Review Document

Career
Development:

We are unaware of any training program currently in place to further Division-wide career development strategies.

We are aware of several one, two and three week BASIC and LATENT fingerprint courses taught by the DPS/Austin and the FBI. However, these are generally limited to a handful of personnel. Moreover, attempts to expand outside training to a larger internal audience are hampered by critical staff shortages.

File Maintenance:

Prisoner Identification Cards are filed according to their Henry Classification. It is important to review each drawer's content in the filing system and ensure that cards are in their proper place.

File Maintenance is assigned to the Night Shift Supervisor, who is also responsible for that shift's operations. We suspect that a minute portion of this supervisor's time is actually dedicated to file maintenance activities.

We are formed that overtime funds are used to support file maintenance functions due to personnel shortages.

Finding #12: Confidence in the Department's Criminal History database has suffered due to HPD management's position, which can only be characterized as "uninterested."

Excerpt from 1991 Management Review Document

Several personnel interviewed, in addition to documents obtained from Mrs. Wood's husband (Terry) and AFIS and Latent Print Examiner staff, call into question the accuracy of the Department's criminal information database.

We find that ineffective and (apparently) unenforced quality control measures by Jail Division supervisor staff, and poor "front-end" quality control of the clerical section of ID are the major contributing factors associated with this lack of confidence.

Further, our findings also reveal that a high percentage of mis-identifications can be traced to an HPD (or other) identifying number having been transposed by clerical support staff and/or Jail Attendants. Because of the method used to validate on prisoner's identify from another, which we believe is a sound practice, the clerk (or Jailer) lays the foundation for the "bum intent;" which is usually caught by the AFS system during validation and/or quality control procedures. Clearly, we believe that:

> The identification of the bum indent by AFS should not be considered a failure of the identification process. Rather, we believe the opposite is true. It is an indication that AFS centered quality control is working, not failing.
>
> Management has focused on what we will call "mid stream" perfection. In the past, management has held the wrong person accountable for an identification error. Who, we ask, is more responsible: The clerk

that transposed a number and starts the bum indent, the FPT/FPC who fails to catch the transposed number, or the supervisor who approves the work of both?

The FPC/FPT working the Print Room is held accountable for all work produced during his/her tour of duty. Perfection is clearly a lofty goal, and one that should be at the forefront of all operations. Reality, however, cannot be factored out:

a. The FPC/FPT working the Print Room has no measure of control over the amount of work processed by the Print Room. His/her primary function if to ensure that the rolled finger impressions are of sufficient quality (and in the right place on the fingerprint cards) as to effect an identification.

b. Jail Division personnel are rotated quite frequently with little regard for actual fingerprint quality. To Jail Attendants, fingerprinting prisoners is a very small if no insignificant part of their job.

c. FPC/FPT personnel have no control over how may and when prisoners are directed to the Print Room for processing. Neither do they have supervisory authority over Jail Attendants assigned to the Print Room.

Excerpt from 1991 Management Review Document

Recommendation #12: To effectively resolve the identified issues, we recommend the following actions be considered:

It is important that the Department have confidence in its criminal history database. This is one area of practice when perfection is easily achieved, providing necessary precautions are observed:

> Synchronize to the extent possible Charge Index Tables used by the Jail and Identification Divisions.
>
> Our investigation revealed that the Jail Division uses (or used) a different set of charge information tables than dos (or did) the Identification Division.
>
> Data input by the Jail Division's operation, specifically the Arrest Blotter, will form a key element of the Identification Division's criminal history database.
>
> If the two Division's databases are not synchronized within reason, then database accuracy will undoubtedly be called into question. We are aware of instances where a suspect is arrested for Class A Assault (and is actually charged with that offense), but the CHARGE on the Arrest Blotter indicates Criminal Attempt Murder. Other instances include *AFFRAY* to *Murder* and *AUTO THEFT TO AGGRAVATED KIDNAPING.*
>
> Perform an audit of the Identification Division's criminal history database to ensure that all files to the extent possible - contain the correct information, and

that proper and effective management controls are in place to support the data's integrity.

We have been repeatedly informed that Jail Division and Identification Division management have had personal knowledge of the problems described regarding the criminal history database for some time. And, we are routinely informed that both Division's management actions have been less than enthusiastic.

We believe that the Jail Identification Divisions management team have a failed to grasp the true severity of the problem. We have countless records available which serve to validate the opinions offered by those interviewed:

Neither Division's management *has demonstrated* an appreciation of the seriousness that a corrupted criminal history database could pose to the department (and the City).

APPENDIX R

TEX. LOCAL GOV'T CODE § 143.036 (1998)

§ 143.036. Procedure for Making Promotional Appointments

(a) When a vacancy occurs in a nonentry position that is not appointed by the department head as provided by Sections 143.014 and 143.102, the vacancy shall be filled as prescribed by this section and Section 143.108, as applicable.

(b) If an eligibility list for the position to be filled exists on the date the vacancy occurs, the director, on request by the department head, shall certify to the department head the names of the three persons having the highest grades on that eligibility list. The commission shall certify the names within 10 days after the date the commission is notified of the vacancy. If fewer than three names remain on the eligibility list or if only one or two eligible promotional candidates passed the promotional examination, each name on the list must be submitted to the department head.

. . .

(d) If an eligibility list does not exist on the date a vacancy occurs or a new position is created, the commission shall hold an examination to create a new eligibility list within 90 days after the date the vacancy occurs. . . .

(f) Unless the department head has a valid reason for not appointing the person, the department head shall

appoint the eligible promotional candidate having the highest grade on the eligibility list. If the department head has a valid reason for not appointing the eligible promotional candidate having the highest grade, the department head shall personally discuss the reason with the person being bypassed before appointing another person. The department head shall also file the reason in writing with the commission. On application of the bypassed eligible promotional candidate, the reason the department head did not appoint that person is subject to review by the commission. . . .

TEX. LOCAL GOV'T CODE § 143.108 (1998)
(PROVISIONS APPLICABLE TO MUNICIPALITY WITH POPULATION OF 1.5 MILLION OR MORE)

§ 143.108. Promotional Examination Grades; Promotional Appointments

. . .

(b) If an eligibility list exists on the date a vacancy occurs, the vacancy shall be filled by permanent appointment from the eligibility list furnished by the commission within 60 days after the date the vacancy occurs. If an eligibility list does not exist, the vacancy shall be filled within 95 days after the date the vacancy occurs from an eligibility list that the commission shall provide within 90 days after the date the vacancy occurs.

(c) If a fire or police department fails to fill a vacancy by an appointment within the time required by Subsection (b), the fire fighter or police officer who is appointed to fill the vacancy is entitled to receive in a lump-sum payment the difference between the pay that the fire fighter or police officer would have received if the fire fighter

or police officer had been appointed to the position on the latest day provided for the appointment by Subsection (b). The fire fighter's or police officer's seniority rights in the new position also date to the latest day provided for the appointment by Subsection (b). . . .